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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA,

FROM JANUARY 7, 1901, TO AUGUST 1, 1901.

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OF

The Supreme Court of the State of Montana,

DURING THE TIME OF THESE REPORTS.

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CORRECTIONS AND ERRATA.

Page 2 line 4 of the opinion, insert the word "to" after the word "object."

Page 82 line 1, read "of" instead of "for."

Page 371 line 28, read "such as failure" instead of "such a failure."

ORDER.

[Entered October 17, 1901.]

All *ex parte* applications must be made at the opening of court in the morning, or when the court is actually in session engaged in hearing cases, and at no other time.

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CASES DETERMINED

IN THE

SUPREME COURT

AT THE

DECEMBER TERM, 1900.

PRESENT:

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM T. PIGOTT,
THE HON. GEORGE R. MILBURN, } Associate Justices.

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STATE EX REL. KING ET AL., PLAINTIFFS, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., DEFENDANTS.

(No. 1,536.)

(Submitted December 10, 1900. Decided January 14, 1901.)

Certiorari—Costs—Stenographer's Fees—Costs of Printing Brief.

1. The fee bill of the Clerk of the Supreme Court, as provided by Political Code, Sec. 872, making no provision for an appearance fee of the defendant

in special proceedings, none can be charged by the clerk in a *certiorari* proceeding.

2. Since, under Code of Civil Procedure, Sec. 1943, the clerk of the court to which a writ of *certiorari* is directed must return the transcript required by the writ to the court out of which the writ issued, the outlay incident to the carriage of the return, maps, etc., should be ultimately borne by the party whose fault occasioned the expense.
3. The cost of expressing briefs to the Supreme Court is not properly taxable as part of the costs.
4. Under Code of Civil Procedure, Sec. 1866, awarding the legal fees paid stenographers for per diem or for copies as costs to the party entitled to costs, and Section 373, prescribing the legal fees of stenographers for copies of the testimony transcribed from their notes, since the clerk cannot transcribe the stenographic notes into longhand, the fee paid the stenographer for such transcription is chargeable as part of the costs.
5. The expense of printing briefs in the Supreme Court is chargeable as part of the costs.
6. Fees paid stenographers in taking dictation of briefs for the Supreme Court and typewriting them are not taxable to the defeated party.

Certiorari by the state, on the relation of Silas F. King and others, to the District Court of the Second Judicial District and the judge thereof. Motion for retaxation of costs. Sustained in part.

Messrs. McBride & McBride and *Mr. E. N. Harwood,* for Plaintiffs.

Mr. C. P. Drennen and *Messrs. McHatton & Cotter,* for Defendants.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

A writ of *certiorari* was quashed and this proceeding dismissed at the costs of the plaintiffs. (24 Mont. 494, 62 Pac. 820.) The defendants having filed their memorandum of costs, the plaintiffs object each item therein contained and move that it be disallowed upon the ground that it is not a proper charge against them. No suggestion is made that any charge is unreasonable in amount, nor that the expense has not been actually incurred.

The first item is $5 for the appearance fee of the defendants in this Court. Upon the authority of *State ex rel. Baker* v. *Second Judicial District Court,* 24 Mont. 425, 62 Pac. 688, this charge must be rejected. The next items of which com-

plaint is made are charges amounting to 90 cents, paid to an express company for transmitting the return and maps, used on the hearing in the district court to illustrate the testimony of witnesses, to the office of the clerk of the supreme court; this we believe to be a reasonable and necessary expense incurred for the purpose of lodging the return in the office of the clerk, for in *certiorari* proceedings the clerk of the court to which the writ is directed must return to the court out of which the writ has issued the transcript required by the writ (Section 1943 of the Code of Civil Procedure), and the outlay incident to the carriage should ultimately be borne by the party whose fault occasioned the expense. But the charge of 60 cents for "express on briefs" is not properly taxable, and is stricken out. The next item is "Stenographer's fees, transcript included in return, $25.00." The plaintiffs, it seems, considered that the evidence taken at the hearing in the district court might, upon their theory of the case, be deemed material here, and they practically asked that it be included in the return; it further appears that the evidence embodied in the transcript was taken down in shorthand by the official stenographer at the hearing, and was afterwards, by request of the defendants, translated into longhand. A copy of the translated notes of the evidence is included in the transcript certified by the clerk. Section 1866 of the Code of Civil Procedure provides: "A party to whom costs are awarded in an action is entitled to include in his bill of costs, his necessary disbursements as follows: * * * the legal fees paid stenographers for per diem or for copies. * * *" Section 373 of the same Code prescribes the legal fees of stenographers for copies of the testimony and proceedings written out at length or in narrative form from their notes. Under these circumstances, in view of the inability of the clerk to transcribe the phonographic notes of the official reporter, we think this item should not be stricken out; and *State ex rel. Baker* v. *Second Judicial District Court, supra,* is to be distinguished in this respect from the present case, for in the former the matters required to be returned by the clerk of the

district court were copies, which he could make, of the records in his office,—there the fee paid to the clerk was not authorized by law, while here the fee paid to the official stenographer is expressly prescribed by statute. Another item is a charge of $18 for printing briefs filed in this Court; such charge is taxable, according to the course and practice of the Supreme Court. (*Ryan* v. *Maxey,* 17 Mont. 164, 42 Pac. 760; *Waite* v. *Vinson* 18 Mont. 410, 45 Pac. 552; *State ex rel. Baker* v. *Second Judicial District Court, supra.*) The last item is $20 paid to a stenographer for taking in shorthand the dictation of briefs and typewriting them; this is not a legal cost or disbursement taxable to the defeated party; it is disallowed.

It is therefore ordered that the following items in the memorandum be disallowed: Appearance fee paid to the clerk of the supreme court, $5; express on briefs, 60 cents; stenographer's fees in preparing briefs, $20. The other items, amounting to $43.90, are allowed and taxed in favor of the defendants and against the plaintiffs.

MR. JUSTICE MILBURN not sitting.

TALBOTT, APPELLANT, *v.* HEINZE ADMINISTRATOR, RESPONDENT.

(No. 1,196.)

(Submitted April 27, 1900. Decided January 21, 1901.)

Bills and Notes—Failure of Consideration—Contemporaneous Contracts—Time as Essence—Evidence—Failure of Proof—Allegations and Proof—Correspondence.

1. A note sued on was given in consideration of the written contracts of the payee, made a few days before the date of the note, that he would, on or before a certain day, purchase or procure a purchaser for the maker's interests in certain mines at a stated price, and that, if he failed so to do, the maker would be absolved from all liability to convey such interests. *Held,* that these contracts were admissible, under Civil Code, Sec. 2207, as

relating to the same matters as the note in suit between the same parties, and as parts of substantially one transaction.

2. Where a note was given in consideration of the payee's written promise to pay a stated amount for the maker's interest in certain mines before a stated time, such time being expressly declared to be of the essence of the agreement, or that otherwise the maker would be released from all liability to convey such interests, failure to show that the interests were sold within the prescribed time and for the stated price, or a waiver of such conditions, was fatal to a suit on the note.

3. Where a note sued on was payable only on the sale of the maker's interests in certain mines according to the terms of certain contracts made with the payee, an offer to prove that, after a sale of such interests, which did not occur until the time expressly limited by the contracts had expired, the maker had acknowledged the note, and promised to pay it, was an effort to prove a different contract, and inadmissible.

4. Allegations and proofs must correspond.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by James A. Talbott against F. Augustus Heinze, as administrator of the estate of James Larkin, deceased. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Mr. George A. Clark, for Appellant.

Mr. C. P. Drennen, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

The subject of this action, as alleged in the complaint, is a supposed contract, or promissory note payable upon condition, of which the following is a copy:

"BUTTE CITY, MONTANA, October 1st, 1891.

"For value received, I promise to pay to Robert C. Burton the sum of five thousand dollars upon sale of the Snohomish or Tramway mines, said mines being in Summit Valley mining district, Silver Bow county, Montana, and under bond to said Robert C. Burton.

"JAMES LARKIN,

"JAMES A. CUMMINGS,

"Witness."

The plaintiff, as assignee of the note, sued to recover the amount thereof, the complaint stating that on the 4th day of

May, 1893, Larkin sold and conveyed the Snohomish and Tramway mines to the Butte & Boston Mining Company; that thereafter Larkin was judicially declared to be of unsound mind and the defendant Largey was appointed guardian of his person and estate; that on the 12th day of May, 1896, the plaintiff presented to the guardian his claim against Larkin upon the note, which claim the guardian rejected by omitting to take action thereon within ten days after its presentation; and that no part of the note has been paid. The defendants in their answer denied that Larkin executed or delivered the note, and alleged that if Larkin made the note the only consideration for it was an agreement on the part of Burton, the payee, to sell for Larkin his interest in the Tramway mine for the sum of $65,000, and by such sale to obtain for Larkin that sum on or before the 10th day of May, 1892, and to sell for him his interest in the Snohomish mine for the sum of $25,000, and upon such sale to obtain for him that sum on or before the day last mentioned; that Burton never effected such sale of the interest of Larkin in either the Tramway or Snohomish lode claim and never obtained for him the price of $65,000 for his interest in the Tramway, nor the sum of $25,000 for his interest in the Snohomish mine; that Burton wholly failed to comply with the terms of his agreement to effect a sale of the lode claims, whereby the consideration of the note wholly failed and the note is without consideration. The answer contained another defense which need not be stated. In reply the plaintiff denied that the consideration of the note was in whole or in part an agreement of Burton to sell for Larkin his interest in the Tramway mine for $65,000, and by the sale to obtain for Larkin that sum on or before the 10th day of May, 1892, or any other day, and to sell and obtain for Larkin the price of $25,000 for his interest in the Snohomish lode claim on or before May 10, 1892, or any other date; he denied that the only, or any part of, the consideration for the note was an agreement of Burton to sell and obtain for Larkin any fixed sum for both or either of the mines or on or before any date. There was a verdict and judg-

ment for the defendants. The plaintiff appeals from an order refusing a new trial and from the judgment. Since the taking of the appeal, Larkin, and Largey, his guardian, have died and F. Augustus Heinze, as administrator of the estate of Larkin, has been substituted in their stead as the defendant and respondent.

Although twenty-three alleged errors are specified, the consideration of two of them suffices to raise a question the answer to which will obviate the necessity of determining any other point. It is conceded that prior to May 4, 1893, Larkin was the owner of an undivided two-thirds interest in the Tramway lode claim and of an undivided one-half interest in the Snohomish lode claim, the remaining interests being then owned by one McNamara. Burton, who was called as a witness for the plaintiff, testified that "the foundation for the giving of the note in suit" was the written leases and contracts, hereinafter described, dated September 26, 1891, entered into between Larkin and himself in respect of the Snohomish and Tramway lode claims. Before these contracts were made Burton asked Larkin to sign the note, which Larkin agreed to do, Burton further testifying that the note was intended "as a part of my commission for effecting a sale of the property under bond." The "bond" of which he speaks consists of the two contracts of September 26, 1891. It further appeared that a sale of his interest in the Snohomish and Tramway lode claims was made by Larkin to the Butte & Boston Mining Company on the 3d day of May, 1893, for the sum of $22,100, the evidence tending to prove that Burton assisted in bringing about the sale. The defendants then offered in evidence the two leases and contracts referred to by Burton in his testimony, made on the 26th day of September, 1891, five days before the date of the note described in the complaint, between Larkin and Burton, by which Larkin let to Burton for a term ending with the 10th day of May, 1892, his interests in the two mining claims, and in which Larkin promised that in the event Burton should on or before the 10th day of May, 1892, pay to him the sum of $65,000,

the purchase price agreed upon between the parties for Larkin's interest in the Tramway lode, or the sum of $25,000 for his interest in the Snohomish lode claim, or the sum of $90,000 for both interests, he would immediately upon receipt of the money convey to Burton the property so purchased. Each contract further provided that if Burton failed to pay to Larkin the purchase price mentioned therein on or before the 10th day of May, 1892, Larkin should be absolutely released from his agreement to convey and should no longer be held or bound thereby, time being declared to be of the essence of the agreement to convey. The time prescribed in the lease and agreement with respect to the Snohomish lode claim for performance by Burton of the conditions was extended so as to include October 1, 1892. The defendants also offered in evidence two contracts dated September 26, 1891, between McNamara and Burton containing the same provisions as those set out in the contracts between Larkin and Burton, except that the interests which McNamara promised conditionally to convey were one-half and one-third, respectively, in the Snohomish and Tramway lode claims, the price agreed upon therefor being $30,000 for McNamara's interest in the Snohomish and $80,000 for his interest in the Tramway. To the introduction of these four contracts the plaintiff objected upon the grounds that they were immaterial, irrelevant and incompetent, and as contradicting, altering or varying the note sued upon by evidence contained in other written agreements which do not appear to have been contemporaneous therewith. The objection was overruled, the plaintiff excepting, and the papers were received in evidence. The admission of these contracts is specified as error.

Whether the contracts between Burton and McNamara were relevant we do not inquire; if irrelevant, their admission did not prejudice the plaintiff. The contracts between Larkin and Burton of September 26, 1891, and the contract or note in suit related to the same matters, were between the same parties, were made as parts of substantially one transaction, and all of them were, therefore, relevant and material. They should be

taken together as one contract. This common-law rule has been incorporated into Section 2207 of the Civil Code. So reading the contract which is the subject of the action, it manifestly appears that the $5,000 therein mentioned was to be paid by Larkin to Burton only in the event that Larkin's interest in the Snohomish lode claim should, on or before October 1, 1892, be sold to or through Burton for the sum of $25,000, and his interest in the Tramway lode claim should be sold to or through Burton for the sum of $65,000, on or before the 10th day of May, 1892. There was no evidence tending to prove that a sale of either interest was made within the prescribed period, nor that the purchase prices agreed upon in the contracts of September 26th were ever paid; on the contrary, the only sale was the one of May 4, 1893, the purchase price of both pieces of property being $22,100. Time was expressly declared to be of the essence of the contract of sale; and the payment of the full sum of $90,000 was also a material and essential part of these agreements. For aught that appears in the pleadings or evidence the conditions of the contracts of September 26, 1891, had not been performed by Burton; unless these conditions were waived by Larkin, or the contract was modified or a new contract made, the plaintiff failed to make a case sufficient to go to the jury. This brings us to the only other specification of error which need be noticed:

Plaintiff offered to prove by Burton that on May 4, 1893, after the sale was made to the Butte & Boston Mining Company, the witness had a conversation with Larkin in which Larkin acknowledged the note and promised to pay it. An objection to the offer as an attempt to prove a contract other than the one sued upon was sustained, the plaintiff excepting. In this there was no error. The subject of the action was the note of October 1, 1891, which, as the evidence disclosed, was payable by Larkin only upon the performance by Burton of certain conditions expressed in two other contracts of date September 26, 1891; the cause of action stated was the alleged breach by Larkin of the supposed obligation imposed upon him to pay $5,000 upon a

sale being made of his interests in the mines at any time whensoever and at any price whatsoever. The plaintiff's offer was an effort to prove a subsequent contract by which Larkin waived the performance by Burton of the conditions imposed upon him, and not the contract upon which the action was based. The plaintiff counted upon one contract and sought to prove a different contract as the basis of his action. No new contract was pleaded, nor was it alleged that Larkin had waived the performance of the conditions as to time and price. The allegations and proofs must correspond. The conditional liability of Larkin under the contracts of September 26 and the note of October 1, 1891, had ceased by the very terms of the contracts themselves before the day—May 4, 1893—when Larkin's interests in the lode claims were sold for $22,100, instead of $90,000. A plaintiff must recover for the breach of the contract forming the basis of his action, and will not be permitted to prove as his cause of action the breach of a different contract. Although the evidence offered would, if received, have tended to support the averment that Larkin executed the note, yet this could not have aided the plaintiff, for upon the pleadings and admitted facts he was not entitled to submit the case to the jury. Though the defendants had conceded that Larkin made the note, the vital defect in the case would still exist. The liability of Larkin depended upon the performance or fulfillment of certain conditions by Burton; Burton confessedly failed to perform them.

Being of the opinion that upon the evidence the plaintiff did not make, and that under the pleadings and his offers of evidence, he could not have made, a sufficient case to go to the jury, we refrain from deciding any of the other questions presented by the record.

The judgment was clearly in favor of the party entitled to it. The order refusing a new trial and the judgment are therefore affirmed.

Affirmed.

STATE, RESPONDENT, *v.* WHORTON, APPELLANT.

(No. 1,563.)

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(Submitted January 14, 1901. Decided January 21, 1901)

Criminal Law—Grand Larceny—Evidence—Instructions.

1. Evidence, in a prosecution for a grand larceny, reviewed, and *held* insufficient to convict the defendant, since it raised no more than a suspicion of the alleged guilt of the defendant.
2. In a prosecution for grand larceny, an instruction that "in this case there is no allegation in the information that the property was in excess of fifty dollars; therefore it must have been taken from the person of the said G., or else defendant must be found not guilty,"—though not perspicuous, correctly stated the law, when considered with other instructions defining grand larceny.

Appeal from District Court, Choteau County; Dudley Du bose, Judge.

BEN WHORTON was convicted of grand larceny, and he appeals. Reversed.

Mr. Wm. G. Downing, for Appellant.

Mr. James Donovan, Attorney General, for the State.

MR. JUSTICE MILBURN delivered the opinion of the Court.

The defendant, Ben Whorton, was tried in the district court of Choteau county on the 24th day of February, 1900, upon an information charging him with the crime of grand larceny, in that, as it was alleged, he did feloniously steal, take and carry away from the person of one George Pulliam two $20 gold pieces, coin of the United States, of the value of $20 each, the property of the said George Pulliam.

The record recites that the defendant was duly arraigned, and that, it appearing to the court that he was without means and without counsel, the court assigned counsel to defend him; that

thereafter, it appearing that the court had been misinformed as to the poverty of the defendant, the court revoked its order assigning counsel; that, as appears from the record, the case was on February 23d set for trial; that, the cause coming up for trial on the 24th, the defendant elected to go to trial without counsel, and, the jury being duly impaneled and sworn, the cause proceeded to trial, and, being submitted to the jury, the defendant was convicted, and sentenced to a term of eight years in the state's prison.

The defendant having employed counsel after conviction, a motion for a new trial was duly made, heard, and denied, and an appeal taken from the judgment and the order denying such new trial.

The points relied upon by counsel in his brief and argument are as follows: (1) That the verdict is contrary to the law and evidence; (2) that the defendant was not arraigned as required by law; (3) that the defendant was not represented by counsel at the trial; and (4) that instruction No. 7 was against the law.

This Court is of the opinion that the verdict of guilty is not supported by the evidence. Without considering the evidence which is favorable to the defendant, but taking into consideration that only which might tend to prove his guilt, it appears therefrom that on the day of the alleged crime the prosecuting witness, George Pulliam, and the defendant had been in a saloon together at Fort Benton, where the defendant had been "hanging around" Pulliam, and where they had been gambling together, and where the prosecuting witness exhibited certain $20 gold pieces and other money to several persons, including the defendant; that in the night of the same day the prosecuting witness engaged in a scuffle with some one not the defendant, severely injuring his leg, so that it was necessary to take him to the hospital, that he was carried in a wagon which had a seat running lengthwise on each side thereof; that defendant went with the surgeon and the prosecuting witness, holding the head and shoulders of the latter while the doctor held the foot and ankle of the injured man; that, arriving at the

hospital, the doctor went to the building to inform the nurse, and while he was gone the defendant asked the prosecuting witness to give him some money "to eat on;" that the prosecuting witness said that he would give him some money after he got over his pain; that defendant was "pretty handy there" in the room until the leg was set; that the prosecuting witness had two $20 gold pieces loose in the pocket of his mackinaw, and one $20 gold piece in his purse besides; that the prosecuting witness found his two $20 gold pieces were missing and gone about half an hour after his leg was set at the hospital; that two or three days thereafter the defendant was seen to have "a lot of bills" and two $20 gold pieces, which he was "flourishing around;" and that on the day of the accident, and before, defendant had been heard to make statements showing that he was without money. These appear to be all of the incriminating facts.

The Court is of the opinion that this evidence does not raise more than a suspicion of the alleged guilt of the defendant, and that the defendant should not have been convicted thereon.

Instruction No. 7, complained of , is as follows, to-wit: "In this case there is no allegation in the information that the property was in excess of fifty dollars; therefore it must have been taken from the person of the said George Pulliam, or else the defendant must be found not guilty." When read with the instructions defining grand larceny, instruction No. 7 correctly states the law, but is not, perhaps, a model as to the style of language used to express the idea intended to be conveyed to the jury, and upon a new trial may well be remodeled by the court.

As the other questions raised are not likely to arise upon a new trial, they are not passed upon in this opinion.

The judgment and order appealed from are therefore reversed, and the cause is remanded for a new trial.

Reversed and Remanded.

MURRAY ET AL., APPELLANTS, v. MONTANA LUMBER AND MANUFACTURING CO., RESPONDENT.

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(No. 1,247.)

(Submitted October 5, 1900. Decided January 28, 1901.)

Public Lands—Mining Claims—Certificate of Purchase—Patents — Trusts — Ejectment — Defenses — Evidence — Appeal—Rules of Supreme Court—Briefs—Assignment of Error.

1. Where appellant's brief,—filed while former rules were still in force,—contains assignments of error which fail to comply with the requirements of the former, as well as the present, rules, such assignments will not be considered.
2. Where an assignment of error in appellant's brief, though fatally defective under the rules in force when the brief was filed, yet so far complies with the present rules as to enable the Supreme Court to examine the questions raised by it without additional labor, the Court will waive such defect.
3. Where assignments of error are not referred to in the argument in appellant's brief, the Court will assume that counsel for appellant considered them without merit.
4. The courts will exercise their equitable powers to control and limit the operation of a patent as between adverse claimants whenever it is made to appear that by a mistaken application of the law to the facts by the officers of the land department the patent has been issued to the wrong person, or when the holder of the legal title under it has obtained it by fraud upon the rights of one who is entitled to it.
5. A certificate of purchase issued by the government is evidence that the party receiving it had complied with all the conditions prescribed by law, and that he had acquired a vested interest in the land covered by the certificate.
6. The land covered by a certificate of purchase, immediately on the issuance thereof, becomes segregated from the mass of the public lands, and it is not subject to entry by any one else, and the officers of the land department have no right to convey said land to any one else, so long as the certificate is outstanding.
7. Where plaintiff brings ejectment to recover a mining claim, and the defendant offers evidence of a superior claim, and that plaintiff wrongfully obtained the patent thereto, and holds the property in trust for defendant, it is not error to refuse to strike out such evidence for insufficiency, but the proper method is to move to direct a verdict.
8. Where ejectment is brought to recover a mining claim which has been patented to the plaintiff, the defendant may show as a defense thereto that he had purchased a prior claim thereto, and was entitled to a patent therefor, but that his vendor afterwards wrongfully conveyed the same property to a third person, who relinquished the claim to the government, which enabled plaintiff to obtain title to the property.
9. Where defendant in ejectment for a mining claim patented to plaintiff claims under a prior claim purchased from one who received a certificate

of purchase therefor, he may show that plaintiff's patent was wrongfully procured, though his vendor did not adverse the ejector's application.

10. Where evidence offered by defendant is admissible against one plaintiff, but not against another, the latter cannot complain of the refusal of the court to strike out such evidence.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

EJECTMENT by James A. Murray and Home Investment and Realty Co. against the Montana Lumber & Manufacturing Company. From a judgment in favor of the defendant, and from an order denying a new trial, the plaintiffs appeal. Affirmed.

STATEMENT OF THE CASE.

Action in ejectment to recover possession of a portion of the Railroad lode mining claim, situate in Silver Bow county, and designated as mineral entry No. 1,594. The complaint is in the ordinary form, alleging title and right of possession in plaintiffs, and ouster by defendant. The answer denies title and right of possession in plaintiffs, admits that defendant is in possession, and then proceeds, by way of equitable counterclaim, to allege facts upon which defendant demands a decree declaring the plaintiffs are trustees of the legal title for its benefit, and requiring them to convey the same to it by suitable conveyance. To the counterclaim replication is made, denying many of the allegations made therein, admitting others, and averring that defendant should not be heard to set up any claim to the title, because no adverse claim had been made by defendant during the period of publication under Murray's application for patent; and upon the issues thus raised a trial was had to a jury which rendered a general verdict for plaintiffs, with special findings as to the facts stated in the counterclaim. Thereupon the court, on motion of defendant, rejected the general verdict and certain of the special findings, approved the others, and entered judgment thereon in favor of the defendant for the relief demanded.

The facts set forth by defendant and found by the jury may

MURRAY ET AL., APPELLANTS, *v.* MONTANA LUMBER AND MANUFACTURING CO., RESPONDENT.

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(No. 1,247.)

(Submitted October 5, 1900. Decided January 28, 1901.)

Public Lands—Mining Claims—Certificate of Purchase—Patents — Trusts — Ejectment — Defenses — Evidence — Appeal—Rules of Supreme Court—Briefs—Assignment of Error.

1. Where appellant's brief,—filed while former rules were still in force,—contains assignments of error which fail to comply with the requirements of the former, as well as the present, rules, such assignments will not be considered.
2. Where an assignment of error in appellant's brief, though fatally defective under the rules in force when the brief was filed, yet so far complies with the present rules as to enable the Supreme Court to examine the questions raised by it without additional labor, the Court will waive such defect.
3. Where assignments of error are not referred to in the argument in appellant's brief, the Court will assume that counsel for appellant considered them without merit.
4. The courts will exercise their equitable powers to control and limit the operation of a patent as between adverse claimants whenever it is made to appear that by a mistaken application of the law to the facts by the officers of the land department the patent has been issued to the wrong person, or when the holder of the legal title under it has obtained it by fraud upon the rights of one who is entitled to it.
5. A certificate of purchase issued by the government is evidence that the party receiving it had complied with all the conditions prescribed by law, and that he had acquired a vested interest in the land covered by the certificate.
6. The land covered by a certificate of purchase, immediately on the issuance thereof, becomes segregated from the mass of the public lands, and it is not subject to entry by any one else, and the officers of the land department have no right to convey said land to any one else, so long as the certificate is outstanding.
7. Where plaintiff brings ejectment to recover a mining claim, and the defendant offers evidence of a superior claim, and that plaintiff wrongfully obtained the patent thereto, and holds the property in trust for defendant, it is not error to refuse to strike out such evidence for insufficiency, but the proper method is to move to direct a verdict.
8. Where ejectment is brought to recover a mining claim which has been patented to the plaintiff, the defendant may show as a defense thereto that he had purchased a prior claim thereto, and was entitled to a patent therefor, but that his vendor afterwards wrongfully conveyed the same property to a third person, who relinquished the claim to the government, which enabled plaintiff to obtain title to the property.
9. Where defendant in ejectment for a mining claim patented to plaintiff claims under a prior claim purchased from one who received a certificate

of purchase therefor, he may show that plaintiff's patent was wrongfully procured, though his vendor did not adverse the ejector's application.

10. Where evidence offered by defendant is admissible against one plaintiff, but not against another, the latter cannot complain of the refusal of the court to strike out such evidence.

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The facts set forth by defendant and found by the jury may

be stated substantially as follows: On June 24, 1880, one John Noyes and his wife, Elmira, under a location made on October 27, 1879, applied to the United States for a patent to the Placer mining claim through the United States land office at Helena; and thereafter such proceedings were had in pursuance of this application that on February 26, 1886, they paid the purchase price to the government, and received a certificate of purchase. This claim was designated as mineral application No. 787 and mineral entry No. 1,347. On January 30, Noyes and wife conveyed the whole of the claim to James W. Forbis. On November 28, 1888, the same grantors, in conjunction with one Upton and his wife, again executed a deed to the same property to the said Forbis; and on May 4, 1889, said Forbis and his wife conveyed the portion thereof in controversy herein to the defendant, which thereupon entered into possession. These various conveyances were properly acknowledged and recorded with the county clerk of Silver Bow county. On August 1, 1887, the plaintiff Murray applied to the United States land department for a patent to the Railroad lode mining claim, under a location thereof made on October 29, 1881. The application proceeded to entry, but, pending the approval of the entry by the commissioner of the general land office, and on June 16, 1888, it was discovered by that officer that there was a conflict between the Placer claim and the Railroad lode claim; and, it appearing that the latter had been located after the patent for the former had been applied for, it was ordered that the entry of the latter be held for cancellation to the extent of 7.18 acres, the area of the conflict. So the matter stood until August 21, 1889, when the commissioner of the general land office ordered a hearing in the land office at Helena as to the merits of the conflict. The proof upon this hearing was taken, but before the controversy was decided there was filed in the land office at Helena a paper, dated September 2, 1890, purporting to be a relinquishment to the United States of the conflicting area, by one George H. Casey and one Charles S. Warren and wife, together with an abstract of the title showing the conveyances

from Noyes and wife to James W. Forbis, heretofore mentioned, and one from James W. Forbis and wife, dated July 8, 1890, to said Warren and Casey. These papers were transmitted to the department at Washington. Thereupon such proceedings were had in the general land office, that on January 24, 1891, the Railroad claim was passed to patent, including the area in conflict between it and the Placer claim; the patent being issued on March 20, 1891. On June 28, 1894, Murray conveyed an undivided fourth interest in the claim to his co-plaintiff, and it is now held by them in common.

The evidence further showed that the portion of the Railroad lode claim in controversy here was included in the area in conflict between this claim and the Placer claim. There was no proof tending to show that Noyes and wife, or the defendant, adversed the claim of Murray in the land office at Helena pending his application for patent.

The plaintiffs have appealed from the judgment and an order denying them a new trial.

Mr. Frank W. Haskins and *Mr. John W. Cotter,* for Appellants.

Assuming that defendant had some right to the ground in controversy under mineral entry No. 1,347, yet that right should come through Noyes, as he was the applicant for the patent and had control of the patent proceedings. Noyes, being the claimant of the ground in controversy, might release and waive his adverse claim. (2 Lind., Mines, Sec. 776; *Richmond Min. Co. v. Rose,* 114 U. S. 576, L. Ed. 273, 276.) Assuming, however, that there was no authorization by either defendant or Noyes, yet it is not shown that Murray had any notice of the issuance of the receiver's receipt to either of them, and, hence, he did not take subject to their equitable claims, unless such notice was brought home to him. (*Lindsey* v. *Hawes,* 2 Black (U. S.), 554, L. Ed. 265; *Stark v. Starr,* 6 Wall. 402, L. Ed. 925, 930.) The record of the deed from Forbis to the defend

ant for the ground in controversy was not notice to Murray or to the Home Investment & Realty Company, as they were not purchases under the same grantor. (1 Devlin, Deeds, Secs. 713, 714; *Long* v. *Dollarhide,* 24 Cal. 218; *Hager* v. *Spect,* 52 Cal. 579; *Roberts* v. *Bourne* (Me.), 39 Am. Dec. 614.) It not being shown in the case that Noyes did not authorize a relinquishment of the ground in controversy, the defendant has failed to show itself entitled to the patent title, and hence it is not in a position to have Murray decreed a trustee. (*Meyendorf* v. *Frohner,* 3 Mont. 282, 322.)

Upon the trial the defendant offered in evidence a certified copy of the receiver's receipt issued to Noyes, which was objected to as incompetent, irrelevant and immaterial, for the reason that the record shows that a patent was issued to Murray for the Railroad lode claim after the issuance of the receipt, and there is no proof of any adverse claim or suit instituted against Murray's application, and that they are barred and estopped from asserting any claim to the property at this time. The patent of the United States may be relied upon for peace and security. (*Eureka Min. Co.* v. *Richmond Min. Co.,* 4 Saw. 302, 9 Mor. M. R. 578.) The doctrine of *res adjudicata* should be rigorously applied to the litigation brought to test the right to the issue of a patent. (*420 Min. Co.* v. *Bullion Min. Co.,* 3 Saw. 634, 11 Mor. M. R. 608.) A patent cannot be collaterally attacked for fraud. (*Meyendorf* v. *Frohner,* 3 Mont. 282, 321; *Boggs* v. *Merced Min. Co.,* 14 Cal. 279, 10 Mor. M. R. 334; *United States* v. *Marshall S. Min. Co.,* 129 U. S. 579, L. Ed. 734, 16 Mor. M. R. 205; *Steel* v. *St. Louis, etc., Co.,* 106 U. S. 447, L. Ed. 226; *Gale* v. *Best,* 78 Cal. 235.

Defendant waived its rights, both legal and equitable, in the property by not adversing the Railroad lode claim application for a patent. (U. S. Rev. Stat. Secs. 2325,2326; *Moxon* v. *Wilkinson,* 2 Mont. 421; *Meyendorf* v. *Frohner,* 3 Mont. 282; *Raunheim* v. *Dahl,* 6 Mont. 167; *Butte Hardware Co.* v. *Cobban,* 12 Mont. 351; *Black* v. *Elkhorn Min. Co.,* 49 Fed. Rep. 549; *Eureka Min. Co.* v. *Richmond Min. Co., supra; Richmond Min.*

Co. v. *Rose, supra*; *Gwillim* v. *Donnellan,* 115 U. S. 45, L. Ed. 348; *Dahl* v. *Raunheim,* 132 U. S. 260, L. Ed. 324; *Turner* v *Sawyer,* 150 U. S. 578, L. Ed. 1189; *Hamilton* v. *Southern Nev. Min. Co.,* 32 Fed. Rep. 562, 15 Mor. M. R. 314, 318; 2 Lind. Mines, Secs. 742 (note), 777.)

"A person claiming possession adverse to the locator of a mining claim cannot delay until the patent is issued, and then, without attacking the patent, claim by virtue of prior possession. The patent concludes and bars the rights which he has neglected, within the time provided by law, to assent." (*Talbott* v. *King,* 6 Mont. 76, 102-103; *Hamilton* v. *So. Nev. Min. Co.,* 33 Fed. 526.) Defendant offered in evidence a copy of a letter, dated January 24, 1891, from the commissioner of the general land office to the register and receiver of the local land office, showing the disposition of the conflict referred to in the letter dated October 6, 1890. To this offer plaintiffs objected, on the ground that it was incompetent, irrelevant and immaterial for any purpose, for the reason that it purports to be a relinquishment on the part of Murray of all of that part of the Railroad lode claim in conflict with the Mary Louise lode claim, which objection was overruled. There was no issue in this case as to any conflict between the Mary Louise and the Railroad lode claims, but the issue was confined strictly to the conflict between plaintiffs and defendant. We submit that this evidence was entirely incompetent and immaterial for any purpose. (1 Jones on Evidence, Secs. 136-140, and authorities cited.)

Mr. F. T. McBride and *Mr. E. N. Harwood,* for Respondent.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the Court.

1. The brief of appellants was filed while the rules of this Court promulgated in 1896 were still in force. Five errors are assigned therein. Three of these assignments are predicated upon rulings upon the admission and rejection of certain evidence. The first and second of them we cannot consider, for

the reason that they neither set out the substance of the evidence upon which the rulings were made, as required by Rule V, Sec. 3, Subd. 2 (16 Mont. 595, 44 Pac. vii), nor refer to the pages and marginal numbers in that portion of the transcript containing the evidence, as required by the rules now in force (Rule X, Sec. 3, Subd. "b," 22 Mont. xxxiv, 57 Pac. vii). The third assignment, while not meeting the requirements of the old rule, so far complies with the present rule, by references to the transcript, as to enable us to examine the questions raised by it without additional labor. We shall, therefore, waive the defect, which would otherwise be fatal, and treat the brief as if filed under the rule now in force. The remaining two assignments are not referred to in the part of the brief devoted to the argument. We therefore assume that counsel for appellants considered them without merit.

2. At the trial, plaintiffs rested the case upon the Murray patent, the conveyance from Murray to his co-plaintiff, and evidence of the rental value of the property during its occupation by defendant subsequent to the date of the patent. Thereupon defendant offered evidence of the other facts set forth in the statement. Objection was interposed to all of it on the ground that it was incompetent, immaterial and irrelevant. When defendant rested, plaintiffs moved the court to strike it all from the record on the same grounds as those stated in the objection. The specific objection urged was that there was an absence of other evidence showing that an adverse claim or suit had been instituted by Noyes and wife, or defendant, against Murray's application for a patent; that at the time Murray entered the Railroad claim he had actual notice of the condition of the title to the Placer claim, and that the Home Investment & Realty Company took its interest with notice; and, therefore, that the facts shown by defendant tended in no way to establish a trust in plaintiffs in its favor. Error is assigned upon the action of the court in overruling the objection and motion.

The objection to this evidence goes to its sufficiency, rather

than to any legal ground for its exclusion from consideration; for it is assumed that, if the evidence which plaintiffs asserted was wanting had been introduced by defendant, it would have been entitled to the relief sought in its counterclaim. And this is undoubtedly a correct assumption, for whenever one person wrongfully obtains title to land which in equity and good conscience belongs to another, whether it be done in good faith or not, he is properly chargeable as trustee for the benefit of such other person. The principle applies to proceedings by which patent is obtained from the United States, as well as to dealings between private individuals; and the courts have readily exercised their equitable powers to control and limit the operation of the patent as between adverse claimants whenever it has been made to appear that by a mistaken application of the law to the facts of the case by the officers of the land department the patent has been issued to the wrong person, or when the holder of the legal title under it has obtained it by a fraud upon the rights of one who is entitled to it. (*Meyendorf* v. *Frohner*, 3 Mont. p. 322; *Hermocilla* v. *Hubbell*, 89 Cal. 5, 26 Pac. 611; *South End Mining Co.* v. *Tinney*, 22 Nev. 27, 35 Pac. 89; *Bernier* v. *Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152; *Lindsey* v. *Hawes*, 2 Black 554, 17 L. Ed. 265; *Cornelius* v. *Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482; and cases cited in *Power* v. *Sla*, 24 Mont. 243, 61 Pac. 468.) The party claiming to be the rightful owner must show, of course, that he stood in such a relation to the government at the time the patent was issued that he was entitled to demand it; but, when this has been made to appear, the mere fact that the patent has been issued to another in no way impairs his right to be declared the owner.

The evidence sought to be excluded by the objection was clearly admissible as tending to show that the defendant was entitled to the relief demanded. That it fell short (if such were the fact) of establishing all the facts necessary to justify the trial court in granting this relief is no reason why it should have been excluded in the first place, or stricken from the record

at the close of defendant's case. From the point of view of plaintiffs, the proper method of attaining the end sought by the objection and motion, viz., the exclusion from consideration by the court and jury of the evidence introduced by the defendant, on the ground that it was insufficient because of its failure in the particular mentioned,—would have been, we think, to request the court to direct a verdict for the plaintiffs upon the main issue, and to submit to the jury the question of damages only. However this may be from any view, the rulings were correct.

It was not necessary for the defendant to show that Noyes and wife, or defendant, had prosecuted successfully adverse proceedings against Murray's application for patent. Noyes and wife had already gone through all the regular proceedings to obtain a patent, and had received a certificate of purchase. This was evidence that they had complied with all the conditions prescribed by law, and that they had acquired a vested interest in the land embraced in the Placer claim. The public faith was thus pledged to them, as well as their grantees, and thereafter the officers of the land department had no right to convey to any one else, so long as the certificate was outstanding. (Lindley on Mines, Sec. 771; *Wirth* v. *Branson*, 98 U. S. 118, 25 L. Ed. 86.) The lands covered by the certificate immediately upon its issuance became segregated from the mass of public lands, and were not subject to entry by any one else. The right to the patent thus became vested in Noyes and wife, and thereafter the title stood as if the patent had already issued. The mere delay in its issuance did not subject them, or their grantees, to additional burdens, or expose them to assaults of third parties. (*Benson Mining & Smelting Co.* v. *Alta Mining and Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; *Stark* v. *Starrs*, 6 Wall. 402, 18 L. Ed. 925; also authorities last cited.) Neither their rights nor those of the grantees were affected by proceedings in the land department, in which it appears they took no part.

Conceding, for the sake of argument, that, in the absence of

evidence showing that Murray had notice of the rights of Noyes and wife at the time his patent to the Railroad lode claim was issued, his title to the portion embraced in the conflict would be good as against the claim of defendant, the rulings of the court below were correct. Under the facts, as shown by the evidence, it cannot be urged that he had no notice of the existence of defendant's rights. The plaintiff Murray took part in the proceedings had under the order of the commissioner of August 21, 1889; he therefore had personal knowledge of Noyes' title. Furthermore, the records of Silver Bow county showed that Noyes and wife had parted with their rights to defendant. He resorted to these records for the evidence upon which he relied to obtain his patent. The abstract obtained from these records and presented to the land department was intended to show that the Casey and Warren relinquishment of the Noyes title—without which he could not obtain a patent—was authorized. Having relied upon what was disclosed by the records touching the condition of the Noyes title, he was bound by whatever they disclosed, and must be presumed to have had notice of their contents. Though he claims under the patent, he virtually occupies the position of a junior grantee of the Noyes title, for the patent would not have issued but for the fact that the commissioner of the land department was led to believe that this title was properly reconveyed to the United States under the alleged relinquishment by Casey and Warren.

Conceding, again, that the Home Investment & Realty Company's title is superior to that of the defendant, in the absence of actual notice of defendant's equities at the time it took from Murray, it stands in no position to complain of the rulings in question. No question was raised here as to the sufficiency of the evidence, or a want of evidence, to sustain the findings, nor that the findings do not support the judgment. So far as a consideration of this feature of the case is concerned, this plaintiff can obtain no relief. And, even though the evidence objected to should properly have been excluded or stricken out at the instance of this plaintiff, the ruling of the court below was never-

theless correct. The purpose of the objection and motion was to exclude it altogether from the consideration of the court and jury. To have done this would have been error, for, as we have seen, Murray had no right to complain and the exclusion of the evidence would have prejudiced defendant's rights as against him. The objection and motion were too broad.

Let the judgment and order appealed from be affirmed.

Affirmed.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

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MONTANA ORE PURCHASING CO. ET AL., PLAINTIFFS, *v.* LINDSAY, JUDGE, DEFENDANT.

(No. 1,639.)

(Submitted January 16, 1901. Decided January 28, 1901.)

Bill of Exceptions—Compelling Judge to Settle and Sign after Term of Office—Statutory Construction—Mandamus—Application.

1. In those cases where the public or persons possess the right to require that the power conferred in a statute by the word "may" be exercised, the word is imperative and mandatory, being the equivalent of "shall" or "must."
2. Under Code of Civil Procedure, Sec. 1158, which provides that a judge "may" settle and sign a bill of exceptions after he ceases to be a judge, he may be compelled to do so.
3. The duty which the writ of mandate may compel to be performed must be ministerial.
4. *Mandamus* will not lie upon application of the prevailing party to compel a judge to amend,—by incorporating therein particular matters, a bill of exceptions tendered by the defeated party, this being the exercise of a judicial, and not a ministerial duty.
5. The writ of mandate will not be made to serve the office of a supervisory control writ.
6. A settled and certified bill of exceptions imports verity; presumtively, the judge included therein everything that it should contain.
7. It is essential that the party, making application to compel a judge to amend a bill of exceptions, allege and show, not only that the matters set

out in his proposed amendment are material, but also there was no evidence or proceeding, other than that contained in the settled bill and the proposed amendment, which is necessary to explain the exceptions.

PEREMPTORY *mandamus* by the Montana Ore Purchasing Company and others against John Lindsay, as Judge of the Second Judicial District Court of the State of Montana. Motion to quash alternative writ granted, and demurrer to application for peremptory writ sustained.

Messrs. McHatton & Cotter, for Plaintiffs.

Messrs. Forbis & Evans, for Defendant.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

Mandamus. The object of this proceeding is to obtain a peremptory writ commanding John Lindsay, Esquire, late one of the judges of the district court of Silver Bow county, to amend a bill of exceptions settled and signed by him while judge. For the purposes of the present motion and demurrer the allegations of the affidavit filed in support of the application must be taken as true. Succinctly stated the facts are these: In an action between the Boston and Montana Consolidated Copper and Silver Mining Company and the relators or plaintiffs herein, which was pending in the court over which Judge Lindsay presided, an order was made refusing to grant a temporary injunction prayed for by the plaintiff therein. To a proposed bill of exceptions tendered by the plaintiff in that action, the relators herein (in whose favor the order denying an injunction had been made) offered an amendment truly setting out certain material evidence received at the hearing but which was omitted from the bill as proposed. Upon the presentation of the proposed bill and amendment for settlement, Judge Lindsay admitted that the matters recited in the amendment as having been introduced in evidence had been received at the hearing, but nevertheless refused to allow it or permit it to be inserted

in the bill, saying that he did not care to do so. He settled and signed the bill, the matter sought to be incorporated by the amendment offered nowhere appearing therein. An alternative writ of mandate was issued on the 4th day of January, 1901, and on the following day was served. Judge Lindsay's term of office expired with the 6th day of January, 1901, and he is no longer judge. He moves the quashal of the alternative writ and demurs to the application.

1. Counsel for the defendant insist that he cannot be compelled to act with reference to a bill of exceptions after his term of office as judge has expired. Whatever doubt may exist with respect to the question when tested by the rule of the common law, it is quite evident that in this state the statute makes it the duty of the person who as judge tried the cause or rendered the decision, to settle and sign a bill of exceptions after as well as before he ceases to be judge. Among the provisions of Section 1158 of the Code of Civil Procedure is the following: "A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer." The duty to settle and sign, when duly requested to do so, a bill which will preserve all the evidence and proceedings, whether in favor of or against either party, necessary to explain the exceptions, is imposed upon him, though he has ceased to be judge. The authority to settle and sign a bill of exceptions which he might have settled and signed while he was judge continues to exist, and the correlative duty attends and inheres in him until performed. It is argued that since the respondent is no longer the judge he now holds no office, trust or station, wherefore there is no duty enjoined upon him which can be said to result therefrom; and it is contended that, while the part of section 1158 which has been quoted permits a judge to settle and sign a bill after he ceases to be such officer, it does not enjoin such settlement and signing upon him as a duty. The cases of *Leach* v. *Aitken*, 91 Cal. 484, 28 Pac. 777, and *State ex rel. Hinchey* v. *Allyn*, 7 Wash. 285, 34 Pac. 914, fully support the position of the defendant. We shall not follow them,

however, for they seem to be based upon a misconception of the force of the word "may" in the statute quoted. This word is sometimes permissive only; sometimes it is imperative. Legislative intent determines whether it is directory or mandatory. According to its natural and usual signification, the word "may" is enabling and permissive only, and so it must be interpreted where no right of or benefit to the public, nor right of persons other than the one upon whom the permission is conferred, depends upon giving to it the obligatory meaning; but the word is interpreted to mean "shall" or "must" whenever the rights of the public or of third persons depend upon the exercise of the power or performance of the duty to which it refers. In those cases where the public or persons possess the right to require that the power conferred by the word "may" be exercised, the word is imperative and mandatory, being the equivalent of "shall" or "must." (*Blake* v. *Portsmouth & Concord Railroad Co.,* 39 N. H. 435; *Tarver* v. *Commissioners' Court,* 17 Ala. 527; *Regina* v. *Adamson,* 1 Q. B. Div. 201; Sutherland on Statutory Construction, Sec. 462, p. 597; Endlich on Interpretation of Statutes, Sec. 306 *et seq.* And see *First National Bank of Helena* v. *Neill,* 13 Mont. 377, 34 Pac. 180, and *Stackpole* v. *Hallahan,* 16 Mont. 40, 40 Pac. 80.) The provision authorizing judges to settle and sign bills of exceptions after they cease to be judges, continues them in an office or station for the purpose indicated. The provision was enacted for the benefit of third persons and to preserve their rights. Every defeated litigant has under the law the right to have settled and signed in the due and orderly course of procedure his bill of exceptions, and each litigant who prevails has likewise the right to demand that the bill containing the exceptions of his adversary shall embrace every matter essential to the fair presentation of the exceptions relied upon by the defeated party. If the writ of mandate lies at the instance of the prevailing party to compel the judge who is still in office to correct or amend a bill already signed by him, it lies also to compel the judge who tried the cause to correct or amend the bill after he has ceased to hold the office. This brings us to the next question.

2. Does *mandamus* lie upon application of the prevailing party to compel the judge to correct or amend a bill of exceptions tendered by his adversary? We observe, in passing, that Section 1157 of the Code of Civil Procedure has no application to any question arising in this proceeding; nor is section 1158 relevant to the question now under consideration. While in the proper case the writ of mandate may be issued to compel a judge to settle and sign a bill seasonably served and duly presented, the writ will not be issued to compel him to incorporate into the bill particular matters. The questions of what occurred at the trial and what evidence or proceedings are necessary to explain or illustrate the exceptions are judicial in their nature, and are to be finally determined, at least in so far as the remedy by *mandamus* is concerned, by the judge or officer whose duty it is to settle the bill. It is his duty in settling the bill or the statement on motion for a new trial to strike out of it all redundant and useless matter, and to make it truly represent the case, notwithstanding the assent of the parties to the incorporation of such redundant and useless matter or of any inaccurate statement. This common-law duty is recognized and declared in Sections 1153 and 1173 of the Code of Civil Procedure. The writ of mandate may issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; it lies to coerce into activity, but not to direct the making of a particular decision or ruling upon a question involving the exercise of discretion or judgment. The duty which the writ may compel to be performed must be ministerial. (*State ex rel. Independent Pub. Co.* v. *Smith, Judge,* 23 Mont. 329, 58 Pac. 867.) The performance here sought to be enforced is of a judicial duty. *Raleigh* v. *District Court,* 24 Mont. 306, 61 Pac. 991, is not inconsistent with the views expressed in this proceeding. *Mandamus* is not the remedy.

We do not decide whether, upon the proper showing, the issuance of a writ of supervisory control would be warranted under the provisions of Section 2 of Article VIII of the Con-

stitution of Montana, as interpreted in *State ex rel. Whiteside* v. *District Court,* 24 Mont. 539, 63 Pac. 395. In the present proceeding an alternative writ of mandate was issued upon an application therefor, and the writ of mandate will not be diverted from its functions and made to serve the office of a supervisory control writ; such is the ruling announced in the case last cited, and now affirmed. The motion to quash will be granted.

3. The defendant contends also that the application for the writ is further insufficient because it does not state that the proposed amendment, when read with the bill, recites all proceedings had upon the hearing which are material to the matter contained in the proposed amendment. The bill which the plaintiffs seek to have corrected was settled and certified. It imports verity. Presumptively the judge in settling the bill included therein everything that it should contain; to rebut this presumption (if in some appropriate proceeding it be rebuttable) it is essential that the plaintiffs allege and show not only that the matters set out in the proposed amendment are material, but also that there was no evidence or proceeding, other than that contained in the settled bill and the proposed amendment, which is necessary to illustrate or explain the exceptions. The demurrer also must be sustained.

The motion to quash the alternative writ of mandate is granted, the demurrer to the application is sustained, and the proceeding is dismissed. Let judgment be entered accordingly.

Dismissed.

CONKLIN, APPELLANT, *v.* CULLEN, RESPONDENT.

(No. 1,616.)

(Submitted January 18, 1901. Decided January 30, 1901.)

ON MOTION TO DISMISS APPEAL.

Appeal—Defective Brief— Dismissal.

An appeal will be dismissed where the statement of the case in appellant's brief fails to comply with the requirement of Subdivision "a" of Section 3 of Rule X of the Supreme Court.

Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

ACTION by S. L. Conklin against W. E. Cullen. From a judgment in favor of defendant, plaintiff appeals. Appeal dismissed.

Mr. Albert I. Loeb, for Appellant.

Messrs. Cullen, Day & Cullen, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

The respondent has moved for a dismissal of the appeal herein on the ground that the brief filed by appellant, besides being defective in other respects, fails to comply with the requirement of Subdivision "a" of Section 3 of Rule X of this Court, in that the abstract or statement of the case does not refer "to the page numbers in the transcript in such manner that the pleadings, evidence, orders and judgment may be easily found." The motion must be sustained. The statement covers five printed pages, but there is nothing therein to indicate, even indirectly, where in the transcript the complaint, answer, findings, and judgment, or any of them, may be found, though a reference to them is necessary to an examination of the merits of the ap-

peal. This Court is left to undertake the labor which counsel should have done, and to remedy the defects occasioned by his omissions. Appellant is thus convicted of a violation of the rule in question, and is subject to the penalty of having his appeal dismissed, which is accordingly done. (*Smith* v. *Denniff*, 23 Mont. 65, 57 Pac. 557; *McCleary* v. *Crowley*, 22 Mont. 245, 56 Pac. 227; *Rehberg* v. *Greiser*, 24 Mont. 487, 63 Pac. 41.) This penalty is the more readily imposed because, though counsel for appellant has had ample opportunity since the motion was filed to remedy the defects complained of, he has not seen fit to do so. (*Rehberg* v. *Greiser, supra.*)

Motion granted, without prejudice to any right of the appellant to take another appeal.

STATE EX REL. MOORE, RELATOR, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

25 31
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(No. 1,647.)

(Submitted January 30, 1901. Decided January 30, 1901.)

Supreme Court—Writ of Supervisory Control.

Under Constitution, Art. VIII, Sec. 2, giving the Supreme Court a general supervisory control over all inferior courts, a writ of supervisory control will not be granted to command a district court to sustain a motion for judgment on the pleadings, since the party has a remedy if he should finally be defeated in the action.

APPLICATION for a writ of supervisory control by the State on relation of Donald Moore, against the Second Judicial District Court for the County of Silver Bow and William Clancy, Judge. Dismissed.

Mr. J. E. Healy, for Relator.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

The plaintiff applies for a writ of supervisory control. His application discloses that in an action between the present rela-

tor, or plaintiff, as plaintiff, and one James A. Murray, one James Cummings, and one T. J. McKenzie as defendants, the plaintiff moved the court in which the action is pending for a judgment on the pleadings, the pleadings consisting of the complaint and the separate answer of Murray, his co-defendants having made default. The motion was denied. By the present application, the plaintiff seeks to obtain a writ of supervisory control commanding the district court and its judge to sustain the motion and render judgment in favor of the plaintiff and against Murray.

The application must be denied and the proceeding dismissed. The facts alleged in support of the application are insufficient to justify the issuance of the writ asked for. If the order of the district court overruling the motion for judgment on the pleadings be erroneous and the plaintiff should be finally defeated in the action, the law prescribes the method whereby, at the proper time, the error (if not cured by amendment or otherwise in the trial court) may be corrected and the rights of the plaintiff protected. The matters stated in the application do not invoke the exercise by this Court of the power of a "general supervisory control over all inferior courts" granted to it by Section 2 of Article VIII of the Constitution. As giving countenance to the application, which the plaintiff asks be entertained under the authority conferred by Section 2. *supra,* counsel cites *State ex rel. Whiteside* v. *First Judicial Dist. Court,* 24 Mont. 539, 63 Pac. 395, and *Montana Ore Purchasing Co. et al.* v. *Lindsay, Judge,* 25 Mont. 24, 63 Pac. 715; but nothing that was said or decided in either case can reasonably be interpreted as suggesting that a writ of supervisory control ought to be issued under the circumstances here shown to exist. The application is plainly so devoid of even the semblance of merit that its further consideration is needless.

The application is denied, and the proceeding is dismissed.

Dismissed.

Re-hearing denied, February 4, 1901.

STATE EX REL. KELLY, RELATRIX, v. DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

25 33
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(No. 1,565.)

(Submitted January 18, 1901. Decided January 30, 1901.)

Executors and Administrators—Final Account—Attorney's Fee—Order of Court—Certiorari—Record.

1. Where an administrator refuses to pay an attorney for the estate, and does not agree to abide by a finding of the court as to the amount due the attorney, the district court has no authority, on objections to the administrators final account by the attorney, to in any wise order the administrator to include any sum of money in his accounts as due to such attorney, or to set apart any sum from the funds of the estate for the use of such attorney, and to amend his final account by including such allowance in it, since the employment and payment of counsel is a personal matter between the administrator and the attorney.
2. Where a writ of review is taken to an order of the district court, which afterwards amends the order, and the original order and the amendment are both in the record before the Supreme Court without objection on the part of the respondent, the several orders may be considered together.

WRIT OF REVIEW on the relation of Mary Ellen Kelly against the Second Judicial District Court of the State of Montana, in and for the County of Silver Bow, and the Honorable John Lindsay, Judge, to review an order in probate. Order annulled.

Mr. Lewis P. Forestell, for Relatrix.

Mr. A. Laist, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This cause comes before the Court upon a writ of review issued upon the petition of the relatrix. The facts seem to be these: Relatrix is the widow and heir at law and a legatee of the testate, and guardian of Hala Claire Kelly, a minor heir; as administratrix with will annexed, she filed a certain account in

theless correct. The purpose of the objection and motion was to exclude it altogether from the consideration of the court and jury. To have done this would have been error, for, as we have seen, Murray had no right to complain and the exclusion of the evidence would have prejudiced defendant's rights as against him. The objection and motion were too broad.

Let the judgment and order appealed from be affirmed.

Affirmed.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

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MONTANA ORE PURCHASING CO. ET AL., PLAINTIFFS, *v.* LINDSAY, JUDGE, DEFENDANT.

(No. 1,639.)

(Submitted January 16, 1901. Decided January 28, 1901.)

Bill of Exceptions—Compelling Judge to Settle and Sign after Term of Office—Statutory Construction—Mandamus—Application.

1. In those cases where the public or persons possess the right to require that the power conferred in a statute by the word "may" be exercised, the word is imperative and mandatory, being the equivalent of "shall" or "must."
2. Under Code of Civil Procedure, Sec. 1158, which provides that a judge "may" settle and sign a bill of exceptions after he ceases to be a judge, he may be compelled to do so.
3. The duty which the writ of mandate may compel to be performed must be ministerial.
4. *Mandamus* will not lie upon application of the prevailing party to compel a judge to amend,—by incorporating therein particular matters, a bill of exceptions tendered by the defeated party, this being the exercise of a judicial, and not a ministerial duty.
5. The writ of mandate will not be made to serve the office of a supervisory control writ.
6. A settled and certified bill of exceptions imports verity; presumtively, the judge included therein everything that it should contain.
7. It is essential that the party, making application to compel a judge to amend a bill of exceptions, allege and show, not only that the matters set

out in his proposed amendment are material, but also there was no evidence or proceeding, other than that contained in the settled bill and the proposed amendment, which is necessary to explain the exceptions.

PEREMPTORY *mandamus* by the Montana Ore Purchasing Company and others against John Lindsay, as Judge of the Second Judicial District Court of the State of Montana. Motion to quash alternative writ granted, and demurrer to application for peremptory writ sustained.

Messrs. McHatton & Cotter, for Plaintiffs.

Messrs. Forbis & Evans, for Defendant.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

Mandamus. The object of this proceeding is to obtain a peremptory writ commanding John Lindsay, Esquire, late one of the judges of the district court of Silver Bow county, to amend a bill of exceptions settled and signed by him while judge. For the purposes of the present motion and demurrer the allegations of the affidavit filed in support of the application must be taken as true. Succinctly stated the facts are these: In an action between the Boston and Montana Consolidated Copper and Silver Mining Company and the relators or plaintiffs herein, which was pending in the court over which Judge Lindsay presided, an order was made refusing to grant a temporary injunction prayed for by the plaintiff therein. To a proposed bill of exceptions tendered by the plaintiff in that action, the relators herein (in whose favor the order denying an injunction had been made) offered an amendment truly setting out certain material evidence received at the hearing but which was omitted from the bill as proposed. Upon the presentation of the proposed bill and amendment for settlement, Judge Lindsay admitted that the matters recited in the amendment as having been introduced in evidence had been received at the hearing, but nevertheless refused to allow it or permit it to be inserted

accurate and incomplete, it is ordered that the same be amended by substitution for the whole thereof of the words and figures following, to-wit:

" 'This day, the final account of Mary Ellen Kelly, administratrix of the estate of John F. Kelly, deceased, together with the objections thereto of Thompson Campbell, and his petition for counsel fees, and the motion of said administratrix to strike said petition and objections from the files, were heard. After argument upon said motion the same was by the court denied, to which said ruling said Mary Ellen Kelly, as such administratrix, by her counsel duly excepted. Whereupon witnesses were examined in support of said petition and objections, in which said examination the said administratrix took no part; and at the conclusion of the testimony, and the account being submitted, it is ordered that said final account be settled upon being amended by including among the unpaid costs of administration of said estate an item of two thousand seven hundred ($2,700) dollars due said administratrix for said Thompson Campbell's attorney fee, and that she be allowed out of the funds of said estate of J. F. Kelly, deceased, for services rendered by said Thompson Campbell for said administratrix and for the benefit of said estate, the sum of five thousand ($5,000) dollars,—a reasonable fee therefor,—less two thousand three hundred ($2,-300) dollars heretofore paid, leaving a balance of two thousand seven hundred ($2,700) dollars as aforesaid.' "

The relatrix, in her brief, submits twelve reasons why the order of the district court should be annulled. The principal points relied upon are the want of jurisdiction in the district court, or the judge thereof, to order the payment by the administratrix of a demand made by an attorney for services alleged to be rendered to the administratrix at her request in the matter of the settlement of the affairs of an estate; that a contract for such services is a private matter between the administratrix and her attorney, to be settled between them, and, if any amount be paid by such administratrix, it may be by her re-

ported in her account of expenses of administration for allowance to her. Counsel for relatrix further relies upon the allegation that no contract was made by and between the administratrix and her said attorney as to the amount to be paid for his alleged services, and that no agreement was made to the effect that he should receive such an amount as the court might fix.

This case has been submitted to this Court upon the theory that it is a proper case for a writ of review, and has been so treated by counsel for all parties; and we so consider it, without passing upon the question, not raised, whether or not appeal will lie from the order as amended. The language of the order as amended July 13, 1900, is not as clear as it might be; but we interpret it to mean that the district court on June 2, 1900, found $2,700 due to said Thompson Campbell, and ordered the administratrix to amend her final account, and to divert said sum of money from the funds of the estate and hold it for the use of said Campbell, although there is no positive direction to pay it over to him. We consider the order void for the reason that the employment of counsel for the administratrix, and payment for the services of such counsel, was a matter of personal and private agreement between her and counsel, to be reported to the court as any other expense in course of administration, for the allowance or disallowance of the court. If the administratrix refused, as she did, to pay the said sum, or any sum, for counsel fees, and had not contracted with the counsel to abide by any finding of the court as to the amount, if any, to be paid counsel, then the court had no power to in any wise order her to include any sum of money in her accounts as due to such counsel, or to segregate and set apart any sum from the funds of the estate for the use of counsel, and to amend her final account by including such allowance in it. (Sections 2771, 2774, Code of Civil Procedure; 1 Woerner on The American Law of Administration (2d Ed.), Sec. 152: 2 Woerner on The American Law of Administration (2d Ed.), Sec-

356; *In re Ogier's Estate,* 101 Cal. 385, 35 Pac. 901; *In re Bullock's Estate,* 75 Cal. 419, 17 Pac. 541.)

Without passing upon the propriety or impropriety of the court's having made further records in the matter after service of the writ of review upon it, we are of the opinion that, the whole record being before us without objection on the part of the respondent, we may properly consider the several orders together; the last one, of July 13, 1900, to be considered as the only one now affecting the relatrix.

The district court's power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute. (*State ex rel. Shields* v. *Second Judicial Dist. Court,* 24 Mont. 1, 60 Pac. 489; *State ex rel. Bartlett* v. *Second Judicial Dist. Court,* 18 Mont. 481, 46 Pac. 259; *In re Higgins' Estate,* 15 Mont. 474, 39 Pac. 506.)

There is no power in the district court, or judge thereof, to make the order directing amendment of the final account as aforesaid. Therefore the said order of June 2, 1900, as amended July 13, 1900, is hereby annulled at the costs of the defendant.

BROWNLEE ET AL., RESPONDENTS, *v.* YOUNG ET AL., DEFENDANTS; LLOYD, APPELLANT.

(No. 1,258.)

(Submitted February 7, 1901. Decided February 11, 1901.)

Promissory Notes—Principal and Surety—Judgments.

Compiled Statutes, Fifth Division, Sec. 1293 (Code of Civil Procedure of 1895, Sec. 1001), refers to the rendition of judgments upon obligations the makers of which signed in fact as principal and surety, and not to judgments upon those on which the makers are all principals; it applies also to cases in which the parties whose rights are to be determined are before the court, and not to cases in which judgment is sought, at the option of the plaintiff, against one of the obligors.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Malcolm B. Brownlee and others against William H. Young and others. From a judgment for plaintiffs, defendant, John E. Lloyd, appeals. Affirmed.

Mr. William H. DeWitt, for Appellant.

Mr. Wm. Scallon and *Mr. W. W. Dixon,* for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

Action to recover the amount due upon a joint and several promissory note made and delivered to plaintiffs by defendants on December 31, 1894, for the sum of $1,500, bearing interest at 1 per centum per month from date. All the makers were made parties defendant. Lloyd and E. H. Irvine were served with summons. Young and F. F. Irvine were not found, nor did they appear in person or by counsel. E. H. Irvine suffered judgment by default. Lloyd filed a separate answer, in which, after admitting categorically all the material averments in the complaint, he alleged specially: "That while the said defendants herein, to-wit, the signers of said note, appear upon the face thereof as joint makers, yet in truth and fact, as between themselves, the said defendants, they are simply sureties, each one for the other, for three-fourths of the amount which they, the said defendants, may be required to jointly pay." The answer concludes with a prayer that "it be adjudged that this defendant, John E. Lloyd, is, as to three-fourths of the amount of said note, only a surety for the three other defendants, and [that the judgment] shall direct the sheriff to make three-fourths of the amount due thereon out of the goods and chattels, lands and tenements, of the said defendants other than this defendant, before he attempt to levy an execution upon the property, personal or real, of this defendant."

On motion of plaintiffs a separate judgment in the ordinary form was entered against Lloyd, the foregoing allegation and prayer being disregarded. It is now contended that the court below erred in failing to render the judgment as prayed. Defendant, in support of this contention, cites Section 1293 of the Fifth Division of the Compiled Statutes of 1887, which is brought forward into the Code of Civil Procedure of 1895 as Section 1001, which follows:

"Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors, or if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it determine the ultimate rights of the parties on each side, as between themselves."

It is apparent from a careful reading of this provision that it refers to the rendition of judgments upon obligations the makers of which signed in fact as principal and surety, and not to judgments upon those on which the makers are all principals. It applies also to cases in which the parties whose rights are to be found and determined are before the court, and not to cases in which judgment is sought, at the option of the plaintiff, against one of the obligors. Under the provisions of the Code of Civil Procedure (Sections 585, 593) and of the Civil Code (Section 1941), all of which were in force at the time the note in question was executed (Compiled Statutes of 1887, First Division, Sec. 20; *Id.* Fifth Division, Sec. 1296), this

may properly be done, and it was evidently the purpose of the plaintiffs to avail themselves of these provisions in this case. Under these circumstances the execution could not run against any of the other obligors, for the reason that they are and could not be included in the judgment, and it would not, therefore, have been proper for the court to modify the judgment to meet the views of the defendant.

True, "where two persons execute a note, and each of them receives one-half of the consideration, they are, as between themselves, principals for half the debt and sureties for each other to the extent of the other half" (24 Am. & Eng. Enc. Law (1st Ed.) 723), and this is so no matter what may be the number of the obligors; but the principle finds application to cases where the right of contribution arises, and not to the rendition of the judgments provided for under the statute above quoted. It is conceded by the appellant that all the parties to the note were principals. This excludes him from the operation of the statute.

Let the judgment be affirmed.

Affirmed.

BUTTE & BOSTON CONSOL. MINING CO., APPELLANT, *v.* MONTANA ORE PURCHASING CO. ET AL., RESPONDENTS.

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(No. 1,459.)

(Submitted June 28, 1900. Decided February 11, 1901.)

Mines and Mining — Co-Tenants — Statutes — Constitutional Law—Vested Rights—Amendments—Construction—Interpretation—Retrospective Operation—Injunction.

1. The Act of February 8, 1865, Section 1 (Bannock Statutes, p. 454), destroyed the right of survivorship in joint tenancies; it, however, was not retrospective in its operation, but affected subsequently accruing rights only, since the legislature had no power to interfere with existing rights by converting joint tenancies into tenancies in common.
2. The Act of February 8, 1865, Section 2 (Bannock Statutes, p. 454), destroyed those characteristics of tenancies in common wherein they mainly differ from holdings in severalty, leaving the necessity for voluntary or judicial partition as the chief remnant of the distinguishing feature of this species of ownership; but it was not retrospective in its operation.
3. For one co-tenant, without the consent of the other, to mine and remove ore from the common property, is an unauthorized taking away and lessening in value of the property within the meaning of the Act of 1865 (Bannock Statutes, p. 454).
4. The provisos of "House Bill No. 1" of the Laws of 1899 (p. 134) apply to co-tenants whose estates were in existence when the law was passed, and, as to such estates, it is an attempt to disturb or destroy vested rights and, therefore, is inoperative and void as to them, being repugnant to Sections 3 and 27 of Article III of the Constitution of Montana, and also Amendment XIV of the Federal Constitution.
5. Any co-tenant whose estate was created after the Act of 1865 took effect, and before the amendment of 1899 became operative, is entitled to restrain by injunction such mining and removal of ore from the common property by his co-tenant, as is prohibited by the statute of 1865 and Section 592 of the Code of Civil Procedure, provided that the remedy at law is inadequate and the threatened injury irreparable.
6. When one state adopts a statute from another state, after a judicial interpretation thereof by the courts of the parent state applicable to the conditions of the adopting state, the legislature will be presumed to have adopted the interpretation with the statute.
7. The preventive force of an act of the legislature, as well as its positive effect, is to be determined by the judiciary; the law-making power cannot determine the past legal force and effect of any statute.

ON RE-HEARING. REVERSED.

For former opinion, see 24 Mont. 125.

Messrs. Forbis & Evans, Mr. Ransom Cooper, Mr. William H. DeWitt, Mr. William Scallon and *Mr. T. J. Walsh,* for Appellant.

Messrs. McHatton & Cotter, Messrs. Clayberg, Corbett & Lee, Mr. Robert B. Smith, Mr. Charles R. Leonard, Messrs. McConnell & McConnell and *Messrs. Toole, Bach & Toole,* for Respondents.

The evidence established that the defendants F. Augustus Heinze and Arthur P. Heinze had long prior to the commencement of this action entered into the actual occupancy of por-

tions of the Tramway and Snohomish lode claims, which were not at the time in the occupancy of the plaintiff, or any one else, and that they had run drifts and made underground workings at much expense for the purpose of extracting ore from said claims, and were engaged in extracting ores therefrom in their right as co-tenants thereof, under the provisions of the law of Montana designated as House Bill No. 1. That at the time they entered into the occupancy of said portions of said claims no objection was made thereto by the plaintiff, and that it made no objection to their carrying on the mining operations therein until the commencement of this action. That they kept accounts of the amount and assay value of all ores extracted by them from said claims. That they were and are solvent and at all times were ready and able to account to their co-tenants for the net profits of said mining operations, and that under the provisions of said law they had a right to the exclusive possession of all those portions of said mining claims of which they were in the actual occupancy at the time this action was commenced and had a right to continue in the exclusive occupancy thereof and to mine and extract the ores from said claims, subject only to an accounting to their co-tenants for any net profits derived from said mining operation.

Where one co-tenant has not joined with his other co-tenants at the time they enter into the actual occupancy of a mining claim or a portion thereof, and engage in doing work for the purpose of mining the claim or extracting ore therefrom, he is not under said law entitled to be threafter let into the occupancy and possession thereof with them. They are entitled to maintain their occupancy of such portion to his exclusion and he has a right, if he so desires, to enter upon any portion of the common property not then in the actual occupancy of his co-tenants and to continue therein and mine the same to their exclusion, each being accountable to the other only for the net proceeds of the mining operations conducted by him. As to such portion he has the same right as if it belonged solely to him, subject only to the condition that he shall account to his

co-tenant or co-tenants for the net profits which he may realize from his mining operations. He is entitled to retain the exclusive control and occupancy of such portion. The only way in which he can be deprived of this occupancy and his right to mine is by partition and sale of the mining claim. The law provides a plain and adequate remedy for a non-joining co-tenant against his working co-tenant or co-tenants. He is entitled to an accounting for the net profits of the mining operations. An injunction will not issue where a party has a plain and adequate remedy at law. It cannot under said law be issued at the suit of one co-tenant against the other.

The refusal to grant the injunction was within the discretion of the district court and the order will not be reversed on appeal. The appellant seems to rely upon Section 592 of the Code of Civil Procedure as construed by this Court in *Anaconda Copper Mining Co.* v. *Butte & Boston Mining Co.*, 17 Mont. 518, and upon that decision, overlooking entirely the fact that said section was repealed by House Bill No. 1 and that the same and the decision of this Court referred to did not, after the adoption of said House Bill, have any effect whatever and are not pertinent of consideration further than that they may be looked to in a consideration of the legislative intent expressed in House Bill No. 1. It is proper to consider said section and the decision referred to for the purpose of construing the present law, and to ascertain the wrong which it was passed to remedy. It has no other importance in this case. It should receive a construction broad enough to remedy the wrong intended to be corrected.

Under Section 592 of the Code of Civil Procedure, one co-tenant without the consent of the other co-tenants could not carry on any mining operations in the common property or do any work thereon. This was found to be a hardship and injustice to co-tenants desiring to develop or mine the common property. A co-tenant owning a small interest in a mine or mining claim and wishing to control the same absolutely had but to refuse to join with his co-tenants in doing work thereon,

or to withhold his consent to their doing work and mining in the claim. It was the wish of the people of the state to change this condition and that the industry of mining should be encouraged rather than retarded, so the legislative assembly in the exercise of its wisdom enacted House Bill No. 1 to the end that each co-tenant might have the use and benefit of his interest in the common property regardless of the wish or consent of his other co-tenants. The act in question is entirely inconsistent in its provisions with Section 592, Code of Civil Procedure, and in so far as mining property is concerned it entirely repeals it. The authorities are all to the effect that where an amendment contains language covering the entire subject of the statute amended, and is inconsistent with it, the original statute is repealed by the amendment. (*Billings* v. *Harvey,* 6 Cal. 381; *Billings* v. *Hall,* 7 Cal. 1; *Clark* v. *Huber,* 25 Cal. 596; *Bensley* v. *Ellis,* 39 Cal. 313; English on Interpretation of Statutes, Secs. 195-196, and cases cited in Note.) The rights of the parties hereto are then dependent upon and governed by the provisions of House Bill No. 1 alone, and that is the only statute for consideration or construction. In construing a statute the court may inquire what was the object the legislative assembly sought. (*Perkins* v. *Guy,* 2 Mont. 15 and 20.)

The mining industry in this state is to be encouraged within legal lines and limitations. It is and has been the policy of the government of the United States to encourage the development and working of mining ground. The cardinal principle in permitting private ownership of mineral lands is that the owner may be encouraged to the extraction of valuable ores therefrom. Generally mining claims are not to be considered valuable aside from the value which they have for the ores which may be contained within them. Their ownership gives the right to develop them and to extract the valuable ores therein contained. It is not true that a mining claim should be worked of itself. The history of mining has demonstrated that the most economical results are obtained by mining claims in connectiou

with others, and through and by means of openings already made. So far as the entry and mining by one co-tenant upon the common property, under the provisions of House Bill No. 1, are concerned, it requires no argument to show that he has the same rights as if he were the sole owner of the claim. The policy of the law and its purpose was to permit a co-tenant to extract ores from the common mining property. Any work that is done in a mining claim in the conduct of actual mining operations for the purpose of extracting ore and which in itself is done in a miner-like manner tends to develop the property. At common law one co-tenant of a mining claim had the right to enter upon the common property and mine, mill and dispose of the ore. This is thoroughly well settled in California, and the doctrine has been approved by this Court. (*McCord* v. *Oakland Q. M. Co.*, 64 Cal. 134; *Anaconda Copper Mining Co.* v. *Butte & Boston Mining Co.*, 17 Mont. 519.)

The law under consideration gives one co-tenant the right to enter on the common property at any point or points not then in the actual occupancy of the non-joining co-tenants, and to occupy the same and carry on mining therein, and to mill and dispose of the ore. Of course there is an obligation which arises from the exercise of the right, and that is that he shall account to the non-joining co-tenant or co-tenants for the net profits of mining operations, if any made. This we say is an obligation but is not a limitation. If the obligation is not discharged a non-joining co-tenant has his action for an accounting.

The Court in construing a statute will give its provisions a reasonable construction with a view to carrying out its objects and giving effect to its general intent. Where there is any doubt, obscurity or ambiguity in a statute, the general intent should control. As we have said, the general intent of this statute is to allow co-tenants to occupy and mine the common property regardless of the wish of their co-tenants. Courts construe statutes by considering the subject matter of the act, its object and intent and giving effect to the general intent

wherever it can be done. Statutes should be so construed as to uphold them and to give effect to their general purpose. This Court has held that co-tenants in mining property are not co-partners. (*Harris* v. *Lloyd,* 11 Mont. 390.)

Reply Brief of Respondents.

In considering the question of the constitutionality of House Bill No. 1, we desire first to present to this Court our views of the decision in the case of the Anaconda Company against the Butte & Boston Company, in 17 Montana, page 519. In the Anaconda Company case the plaintiff was the owner of an undivided interest in the mine and in the ore in question; the court below found this fact and the Supreme Court approved it; the court below also found that the defendant was the owner of the other interest. The property so owned in common was known as the Wild Bill claim. The defendant also owned and was the sole owner of what was known as the Gray Rock Mining claim. The defendant contended that none of the ore which it was taking out belonged to the plaintiff, and alleged that it was part of a vein which had its apex within the surface ground of the Gray Rock, of which it was the sole owner. It will further appear from the record of the case that the defendant refused to allow the plaintiff to take any portion of the ore, of which the court below and the Supreme Court found that it was a co-owner to the extent of one-third. Those facts constituted waste and injury to the interest of the plaintiff in the property. It also constituted an ouster. (See Freeman on Co-tenancy, Sec. 292; *Phelan* v. *Smith,* 100 Cal. 158.) This was waste and injury under the common law, because of the ouster, and because, also, of the fact that the defendant was not only taking its share of the profits, but refused to allow the plaintiff its share thereof, and because of the fact, which further appears in the record, that the plaintiff alleged that the defendant, unless restrained from so doing, would continue in those wrongs, *i. e.* not only taking out the ore, but refusing plaintiff its share in

the ore, etc. There can be no doubt that equity under the former practice would entertain a suit for an injunction in aid of an action at law under such circumstances. We believe that the decision in the Anaconda case should be so far modified as to confine the decision of the Court to the facts involved in the case. Then there would be no reversal of the case.

Counsel admit that appellant's interest in the property was acquired prior to 1895. Therefore, Your Honors are not construing the Act of 1895, which was the law which was construed by the Court in the Anaconda case and the cases which follow it. Your Honors are construing the law of 1864, or 1872, whichever it may be, a different law, a different act, and although similar in some respects to the law of 1895, still different in others; the Court in the Anaconda case reasoned that the act of 1872 did not give the right to an injunction or any other remedy than the remedy of trespass and trover, and that the legislature of 1895 did not consider these remedies sufficient, and, therefore, gave any remedy, including injunction, which might be had if no co-tenancy existed; that case was considering and interpreting one statute, the act of 1895; this Court is called upon to interpret another statute, the act of 1864, or 1872; and although these statutes are somewhat similar, the rule of *stare decisis* does not apply. (See *Wood* v. *Brady,* 150 U. S. 18.) And so as to the Anaconda Company case. The decision may well be approved and followed in all cases involving a similar state of facts, but in so far as the decision is sought to be made to apply to all co-tenancies in common, it should be modified so as to be confined to cases involving the same facts. Still reviewing the Anaconda cause, let us ascertain the meaning of the various words used in the law of 1864, and this is the act upon which plaintiff's right is based. In attempting to interpret these laws, we should take into consideration the subject matter of the statute, which subject matter is, first, the nature of the ownership, and, second, the nature of the property, and also the law theretofore existing. It cannot be said that to use property in the way in which such property is com-

monly used, necessarily constitutes an injury to the property when the same is held by tenants in common. There is no property susceptible of being used, or calculated to be used, which could not be owned by two or more tenants in common; and there is no property which is not more or less injured or lessened in value by its use, and it may well be said that there is no property which does not deteriorate in value when in use. Consequently, to use property may or may not be to injure or abuse it or lessen it in value within the meaning of the statutes. If the property is used in a way the owners thereof contemplated it should be used, then, in the meaning of the statutes, there is no injury, no abuse, no destruction; there is simply an enjoyment of the property. (See Freeman on Co-tenancies, Sec. 249 *a;* see, also *McCord* v. *Mining Co.,* 64 Cal. 134; *Job* v. *Potton L. R.* (XX Eq.), p. 84; *Lenfers* v. *Henke,* 73 Ill. 405; *Wood* v. *Carp. R. I. Co.,* 47 Mich. 65; *Wood* v. *Carp. R. I. Co.,* 50 Mich. 522; *In re Saeger Estate,* 92 Mich. 186.)

The principle seems to be this: That A exercises exclusive ownership in property, or assumes so to do, when he seeks to control it in such a manner as to deprive his fellow co-tenant from his right to use the same. And it seems to be well settled, and equally logical, that where A seeks to prevent B from using the common property in the way such property is ordinarily used, A is then assuming and exercising exclusive ownership of the property. (See Freeman on Co-tenancies, Sec. 318.) The ownership and the nature of the property must be considered; we are of the opinion that to use property held in common in the way such property is by its nature intended to be used, is not waste, is not injury, is not a destruction of the property. So that we contend that, under the act of 1865, the legislature did not intend to prohibit the right of one co-tenant to use property in the way such property was intended by its nature to be used, provided, always, that each co-owner recognizes fully and fairly the rights and equity of his co-tenant to use the same and to share in the profits thereof; and provided, also, that the manner of exercising this use is of such a nature as character-

izes the ordinary prudent business man of affairs. Such a co-tenant is exercising his own right and his own interest in the property, which the law says he may do so long as he does not interfere with the right of his fellow co-tenant to use the same in the same manner and to share in the profits equally. He is merely enjoying his right. Such a use is *"damnum absque injuria"*; it is the result of the exercise of a lawful right, and there can be no injury in the meaning of the law; and we maintain that the statute itself so interprets these various words. After specifying particular acts, it says, "or otherwise injure or abuse;" and again, it says, "shall have his action for the injury;"—so that the act complained of must be what in law constitutes an injury or abuse, and for one who owns property to use it is not an abuse or an injury necessarily, although such an act would constitute the wrong if done by a stranger.

Interpreted as we interpret the law of 1895, the law is not unconstitutional as to any co-tenancy; but if the construction of that law as announced in the dictum in the Anaconda case is to be followed, then the law would be unconstitutional as to all co-tenancies having their origin prior to July 1, 1895, because under the statute of 1864, as contained in the Compiled Statutes, and until the act of 1895, the co-owner was allowed to work the mine in a proper manner, subject only to an action of trover or an action of trespass. (See *Anaconda Co.* v. *B. & B. M. Co.*, 17 Mont. at bot. of page 526, and p. 525.)

Counsel for appellants insist that injunction would lie in this case under the act of 1872. We differ from counsel in this regard. We insist that no right to an injunction was granted by the law of 1872. The statute itself seems the answer to the claim of counsel. The only remedy given by this statute is an action of trover or an action of trespass, and then only "his action of trespass or trover for the injury," that is, the injury done, not a threatened injury. Again we say that this law must be construed with reference to the subject matter. Confining ourselves to the remedy, it will be seen at once that the statute does not mean that co-tenant plaintiff shall have the same judg-

ment as he would if the co-tenancy did not exist; because a co-tenant claiming the same judgment as would be given as against a stranger, would be exercising exclusive ownership of the property. His judgment must be for the "injury" done to his share. If "A" works a mine owned by himself and "B," "B" could not at common law maintain an action for his share of the profits. (See *McCord* v. *Mining Co.*, 64 Cal. 134.) Probably he can under the law of 1864.

We do differ from counsel, and we do claim that no new wrongs are created by the statute of 1864 or of 1872. At common law, one co-tenant could practically maintain the sole possession of personal property and no action would lie, because his possession was consistent with his title; but any act of his which was inconsistent or in conflict with the title and right of his co-tenant, was not only a wrong, but action would lie. (Freeman, Secs. 306, 307.) It was a wrong at common law to take away the common property,—so it was a wrong to destroy or injure it, and so it was to lessen its value or otherwise abuse it. (Freeman on Co-tenancy, Sec. 297.)

Confining ourselves strictly to real estate, the statute of 1864, as continued to 1895, creates absolutely and unqualifiedly no new wrong; under the common law it was a wrong to "assume and exercise exclusive ownership" over real estate, and ejectment would lie, and, if a continuance of the wrong was threatened, a suit in equity in aid of the action at law would be sustained to stay waste; and this act of exercising exclusive ownership might be proved by showing any act inconsistent with the rights of the other co-tenants, such as a sale of the entire title, a denial of the co-tenancy, or using or allowing others to use the property in a way not consistent with its character, as in *Murray* v. *Haverty*, 70 Ill. 318, and in *Davidson* v. *Thompson*, 7 C. E. Green (N. J.) 83; Freeman, Sec. 302. And from Sections 297 to 303 of Freeman, it will be seen that not only was each of the acts mentioned in the statute a wrong at common law, but each was a wrong for which a remedy was given, ejectment, trespass, trespass on the case, according to the nature

of the wrongful act; ejectment for assuming and exercising exclusive ownership; trespass on the case for an abuse or injury which lessened in value; trespass for a total destruction. These laws and every statute must be construed with reference to the subject matter; and the words "abuse," "injure," "lessen," "destroy" and "lessen in value" must be so interpreted as not to destroy the inherent right of the owner of the property or of an interest therein to use the same.

The man who makes two blades of grass grow where only one formerly grew has been called a public benefactor. Counsel desire to change this, so as to say that one co-tenant may prevent a ranch from being cultivated, water from being used, coal from being extracted, timber from being cut—to prevent every industry of the state from being carried on, when two or more are the owners thereof. No man can injure (and we use the word in its legal sense) the property of another by the lawful exercise of his own right. The lawful exercise of ownership is not necessarily an injury, although it may cause damage—this is *damnum absque injuria.* Thus A may by the lawful exercise of his own enjoyment of his own farm cause a loss, or damage to, or lessening of the value of, his neighbor's farm; but the act would be "*damnum absque injuria.*" So A, who is a co-tenant, owns a several and distinct interest, and the lawful exercise of his own right to enjoy his own interest, so long as he does not prevent his co-tenants from enjoying their interests, is not injury within the meaning of the law; again it is *damnum absque injuria.* Co-tenants do not impliedly make promises; but the duty is imposed upon them by law, because of their almost fiduciary relation, that they shall not injure (in the legal sense) the interests of one another; neither one promises the others anything. But the law says that they occupy such a position or relation towards the property that neither shall take advantage of the relation so as to wrong the other; and if he does so, then his act is a wrong for which the law gives a remedy.

When A and B locate a mine, they must do work and labor

thereon—perhaps by sinking a shaft thereon; certainly, if A did the work, it would not be considered an injury because by so doing he extracted ore therefrom. In course of time they apply for patent and obtain it; this patent includes every right given by the statute; under section 2322 by virtue of the patent they have the right to the "possession and enjoyment" of the surface and every vein the top or apex of which lies within the surface boundaries. That is the right that A has and that B has; it enters into the grant to them—each of them can enjoy it to the extent of conveying it to be enjoyed as fully as he could enjoy it himself, and his grantee has the same right to enjoy and convey *ad infinitum*; to take away that right would be unconstitutional. To enjoy a vein, lode or ledge is to use it in the way a vein, lode or ledge is capable of being used by its very nature.

Suppose again that A buys a horse from B, not as a partner but as a tenant in common, and suppose that this law of 1872 is a part of this contract; the same law was a part of the assumed contract at common law; cannot A use the horse? Or a mowing machine, cannot A use the mowing machine? Does not B know that A expects to enjoy his right therein, and does not A know that B expects to enjoy his right therein—the right to use it, and does that use constitute an injury within the meaning of the statute? Such use did not constitute any wrong at common law, although every act specified in the statute was a wrong at common law.

There is no vested right of which plaintiff is deprived by the statute of 1899. If ore has been removed prior to 1899 by defendant, for the ore so removed plaintiff had a cause of action; we are not asking that he shall be prevented from bringing his action. That is not what he is seeking in this application. He seeks to prevent us from exercising our right in the future; that necessarily refers not to a past act, for which plaintiff may have his remedy, but for an act to be done in the future; so there can be no vested right to the form of action for an injury done; and there cannot be a vested right to have a cause of action for a future injury. The right of action in

trover or trespass is still preserved by the act of 1899; and plaintiff is given the further right to demand his share of the ore upon the dump. No right is given to the working co-tenant which he did not, in our opinion, always have; he cannot commit waste; he must not interfere with any co-tenant in his occupancy; he must enjoy the property in a miner-like manner; and he must account for the profits. Even assuming that under the act of 1872 injunction would lie in all cases, the only remedy of which plaintiff is deprived is injunction to prevent defendant from doing, not what he obligated himself from doing, but that which the statute (so interpreted) said he should not do; there is no constitutional right to a particular remedy for a tort. (*Campbell* v. *Mining Co.*, 83 Fed. 645.)

Brief of Respondent in Reply, on Constitutionality of House Bill No. 1.

The statute of 1872 gives the right of trover and trespass for the wrongs mentioned in the statute; it gives no other remedies. And we may remark here incidentally that it does not give injunctions; and that the statute does not say that such a co-tenant shall have the same judgment that he would have against a stranger. These (trover and trespass) were actions that the co-tenant did not have at common law except under peculiar circumstances; he had no action of account for "receiving" more than his just share, except under the statute of Anne, (Freeman on Co-tenancy, Sec. 270); he could not maintain an action of ejectment unless ouster was proved or conceded, (*Id.* Sec. 291). There is nothing to be gained by pursuing this subject; it is enough to say that generally speaking trover and trespass would not lie at common law, that equity furnished certain remedies, injunction very seldom, and to stay waste only in certain cases. Remembering the presumption in favor of the decisions appealed from, then it follows that if Heinze Bros. would have the right to work the mine as a co-tenant either under the common law or under the

law of 1872, then it will be presumed that their right was acquired at that time (1872) or prior thereto—the record being silent as to that.

What were and what are the rights of the co-tenant of a mining claim, the co-tenancy having been created under the law of 1872, or prior thereto? One co-tenant of a farm (except perhaps in Montana) has very much more liberal rights—as against a lazy, unwilling or a grasping or an improvident co-tenant, he may farm the land, husband its crops, and then the profits are his without any accounting. (*Henderson* v. *Eason*, 17 Adol. & Ellis, 702; *Le Barron* v. *Babcock*, 122 N. Y. 153; *Chambers* v. *Chambers*, 3 Hawks, 232; *Pico* v. *Columbet*, 12 Cal. 414; *McCord* v. *Oakland Q. M. Co.*, 64 Cal. 134.) In the early English law there was no right given to one co-tenant as against another to stay legal waste (Jones on Real Property, Sec. 1911), and the writ was not granted except where the act was a malicious or wanton destruction; the right to an account for receiving more than his share was given by statute known as the Statute of Anne, or Westminster 2 C. (See *McCord* v. *Oakland Q. M. Co.*, 64 Cal. 134-143; Vol. 11, Ency. Pl. & Pr. pp. 767 and 770; *Mott* v. *Underwood*, 51 Am. St. 711-715, and cases above cited.) This rule depended upon the fact that each co-tenant had a right to the possession of each and every part of the property. It is not waste for one or two or more co-tenants to farm land (see *LeBarron* v. *Babcock*, 122 N. Y. *supra*); neither is it waste for one of two or more co-tenants of a mining claim to work a mine in the usual way and extract ore therefrom, and by so doing he is not "chargeable with waste, or liable to the other co-tenants in any way, if he does not exclude them." (Jones on Law of Real Property, Sec. 1914; *McCord* v. *Oakland Q. M. Co.*, 64 Cal. 134; *Lynn's Appeal*, 31 Penn. St. 44, 72 Am. Dec. 721; *Crouch* v. *Puryear*, 10 Am. Dec. 528; *Reed* v. *Reed*, 16 N. J. Eq. 248; *Appeal of Fulmer*, 18 Atl. 493; *Findlay* v. *Smith*, 6 Munf. (Va.) 134; *Wood* v. *Carp River I. Co.*, 47 Mich. 65; *Sayers* v. *Hoskinson*, 1 Atl. 308; same case, 110 Pa. St. 473.) And it is to be remembered

that that which is waste when the act is done by a tenant for life is not necessarily waste when done by a co-tenant. (See Jones on Real Prop. Sec. 1911.) Other cases upon the same point and to the same effect might be cited almost indefinitely. The above will suffice, not only to show what is waste, but to show also that that which is waste in the old settled country of England is not necessarily waste in a new country; also to show that for one co-tenant to use property held in common after the manner which that property is usually used and supposed to be used, is neither waste nor an injury to the property, neither does such use, in the eyes of the law, lessen the value of such property; for at common law an action would lie for said acts, if they were injuries.

So we insist that under the law prior to the statute of 1872, and under the law of 1872, no injunction would be granted to one co-tenant to restrain another from working a mining claim in a proper, miner-like manner, and not refusing to allow his co-tenant to join in the work. And, it follows, that if the question of contractual rights is involved in this case, then the law of 1895 is unconstitutional as to all co-tenancies theretofore existing, or which had their origin from co-tenancies theretofore existing—and consequently House Bill No. 1 cannot be said to be unconstitutional as to plaintiff, because that law enlarges and does not impair plaintiff's rights. However, does House Bill No. 1 impair any obligation of any contract? In other words, is there necessarily any contractual relation between tenants in common? Of course tenants in common may make contracts between themselves, such contracts are not involved in this case, but does the mere fact of co-tenancy establish contractual relations? We think not. We have looked in vain for any language in any case indicating any contract arising from this relation. Counsel have cited no cases decisive of such a question. They cite cases from California in which it is held that a law which abolishes joint tenancies is unconstitutional as to those theretofore existing. The cases cited (whatever they decide) stand by themselves as authorities.

The great weight of decisions is against the conclusion of the California Supreme Court. (*Miller* v. *Dennett,* 6 N. H. 109; *Bambaugh* v. *Bambaugh,* 11 S. & R. 191; *Burghhardt* v. *Turner,* 12 Pick. 534-539.)

Each co-tenant, however small his share may be, has certain rights; he has the right to the possession of the entire property —so has his co-tenants, each one being so entitled by virtue of his own right; the interest of each is distinct, the rights of each may be, generally are, obtained at different times and under different deeds and titles. At common law the remedies of a co-tenant were limited to actions of tort entirely. He could not sue his co-tenant *ex contractu.* (See *Shepard* v. *Richards,* 2 Gray 424.) There is no contract between co-tenants. (See *Edsall* v. *Merrill,* 37 N. J. Eq. at p. 115.) There is no privity between them. (*Williams* v. *Sutton,* 43 Cal. 75; see Greenleaf, Sec. 189; see also Freeman on Co-ten. Sec. 169-170, 172.) No estoppel against one affects the other; because the moiety of each is independent of the other. (Freeman, Sec. 168.) All the acts specified in the law of 1872, in the law of 1895, and in the first clause of the law 1899, are torts; and the constitutional prohibition against the impairing of the obligation of contracts does not apply. (See *State of Louisiana* v. *New Orleans,* 109 U. S. 285.) There was no contract at common law between co-tenants not to use the property; the laws of 1872, 1895 and 1899 do not provide remedies for agreements, but remedies for torts.

What obligation of what contract existing between co-tenants is impaired by House Bill No. 1, the law of 1895 or the law of 1872? What promise to do or not to do. There is no such contract, and consequently there can be no obligation of any contract by any of the bills mentioned; and the clause of the Constitution which prohibits the enactment of any law impairing the obligation of contracts, is not involved in this controversy. Let us consider House Bill No. 1 and see what wrongs or imperfections in the law the legislature intendeed to remedy. It is a well known rule of interpretation of statutes that this

should be done. It is also a well known rule of interpretation that the subject matter of the law should be considered. In the first place, then, no act of a co-tenant is made a wrong by any of these statutes which act was not a wrong at common law—not a wrong arising from a contract between co-tenants, but a tort, an injury done to the right of the other co-tenant as to his moiety. To assume and exercise exclusive ownership of the common property was a wrong; if it was personal property, the injured co-tenant had one remedy and this was "but to take this from him who hath done to him the wrong * * * when he can see his time." He could not replevy it; detinue would not lie. (Freeman on Co-tenancy, Secs. 287 to 289.) The law of 1895 gave any form of action appropriate against a stranger. The law of 1872 gave such a co-tenant his action in trover,—but no new wrong is made; it is the old wrong with a new remedy. If the property so held in common and over which one co-tenant assumed and exercised exclusive control, was real estate, the non-consenting co-tenant had his remedy by ejectment; but this remedy was not satisfactory, because the entry of the wrong-doing co-tenant being lawful, ouster must be proved or acts amounting to an ouster. The law of 1872 gives trespass; the act of 1895 gives any action appropriate if against a stranger. It is still the same old wrong; but now it is just as though a stranger was the guilty party, and certainly there would be no contract to be enforced in such a case. "To take away"—this is the next; it was a wrong at common law; no action of replevin would lie; as we have seen; because each had the right to each part of the property; trover would lie only in certain cases. (See Freeman, Sec. 306.) Under the act of 1872 trover would lie; and under 1895 any appropriate action. "To destroy." Here the wronged co-tenant had the right to trover, because here was an ouster; but the act of 1895 gives any appropriate action as if against a stranger. But at common law the property must be "destroyed or something equivalent to it—something which, as it were amounts to an ouster, etc." (Freeman, Secs. 306 and

307.) So the Code adds: "To lessen in value"—or otherwise injure and abuse. We take these together, because they amount to the same thing. At common law, the destruction, or injury or abuse, as we have just seen, must be of such a character as to amount to ouster. The act of 1895 gives any action as if the act had been committed by a stranger. All the old actions remain, we do not undertake to give them all; and in 1872 certain new actions were given, and in 1895 any action appropriate as against a stranger was given. But absolutely and certainly no act becomes a wrong which was not before a wrong. And absolutely and certainly no new right in the property itself was given either by the act of 1872 or 1895; and consequently the act of 1899 does not take away any contract right of the non-consenting owner. Neither the act of 1872 nor the act of 1895 gave to any co-tenant, past or present, the right to have the property lie idle, to keep a house vacant, which might otherwise have been occupied; or to insist that the horse owned in common should not be driven—or to play "dog in the manger" as to any property of which he was one of two or more co-tenants. It merely gave him new actions for old wrongs—for those acts which always have been and always will be wrong. All of the acts mentioned in these laws were and are torts; there may be vested rights in judgments for torts, in actions for torts already committed; but there can be no vested rights to a particular form of action for a tort not yet committed. These laws do not say that acts which are injuries to or destructful of property when committed by a stranger are necessarily injuries when committed by a co-owner of the property. When considering what acts are wrongs, the court must still consider the nature of the property and also the relation which the parties to the action sustain to it and to each other. If a stranger cultivates the land it is a trespass; certainly it would not be when done by one co-tenant; if a stranger to the title drives a horse against the will of the owner, it would be a trespass—would it be if the driving was the act of a co-owner? This general principle to which we refer is

well illustrated in the opinion of the court in *Appeal of Fulmer,* 18 Atl. 493. So the law of 1895 does not make wrong what was right before; but does permit the application of any appropriate remedy to what was always wrongful before, and which owing to the strict rule of the common law was before either not the subject of any action as between co-tenants, or of such a nature that only trespass or trover would lie under the law of 1872. This law did not undertake to say that acts wrongful on the part of a stranger to the title were necessarily wrongs as between co-tenants. In interpreting the law, we must consider the nature of the subject; the legislature of 1872 and 1895 were dealing with property held by a peculiar title—held by co-tenants, each of whom held and owned an undivided interest in each particle of the property, which ownership gave to each one of them the opportunity to do wrong to the other, at the same time that it gave to each of them the right to use and enjoy the property in the way that that particular kind of property was by its nature calculated to be enjoyed; the legislature did undertake to give an action to a co-tenant as against his co-tenant for any such wrong, in 1872 an action in trespass or trover, in 1895 any appropriate action, under both laws in the same manner as though the co-tenancy did not exist;—but it did not intend to take away and did not take away and could not take away any right which each co-tenant had to use the common property; it did not take away, or intend to take away, neither could it take away the right which one co-tenant had to use a horse held in common, even though his co-tenant refused to use it, or the right to use water held in common, even though his co-tenant does not desire to use it, or to use a mine as mines are used and enjoyed, even though his co-tenant does not wish to use or enjoy it.

Let us submit House Bill No. 1 to the test of a brief analysis: (a) It is denominated An Act to amend Section 592 of the Code of Civil Procedure. It re-inacts without change Section 592 and then adds certain qualifications and limitations in the form of a proviso. If, then, there are any amend-

ments to this section at all, we must find them in this proviso. The first paragraph provides "that nothing herein contained shall prevent one co-tenant or join tenant, or any number of co-tenants or joint tenants, acting together less than all from entering on the common property at any point or points not then in the actual occupancy of the non-joining co-tenants or joint tenants and enjoying all the rights of occupancy of the property without waste." This is general and applies to all kinds of property held in any species of tenancy in common. If this be an amendment, it can only affect the first paragraph of section 592, which provides that "If any person shall assume and exercise exclusive ownership over * * * any property held in joint tenancy," etc. At common law one tenant in common could not assume and exercise exclusive ownership over the common property. Now this first paragraph in the proviso does not say that the right of occupancy provided therein, which shall be without waste, is to be exclusive. It does not deny the non-occupying tenant the right to enter and occupy and enjoy without waste the property occupied by them.

(b) The next clause, which is the one affecting the property under consideration in this case, provides that "in the case of mining property from mining the same in a miner-like manner and extracting, milling and disposing of the ore from the common property, paying its or their own expenses, and subject to accounting to the non-joining co-tenant, or joint tenant for the net profits of such mining operations, if any made." There is still another, and the most important of all, provision for the protection of the non-working tenant, to-wit: "But nothing herein shall prevent or preclude the co-tenant or joint tenant from receiving his, its or their proportionate share of all ore or ores on the dump upon payment or tendering payment of the actual cost of mining the same."

The working co-tenant must mine the property in a miner-like manner. He can not gut the mine or mine it in such a way as to injure the property. Now we submit upon these provisions the following observations:

1. The non-working co-tenant, instead of being despoiled of his interest by this act, has its value enhanced. There is no impairment of his property, but there is a betterment of it.

2. The value of his interest in the mine is what can be taken out of it by mining it in a proper way. He has the option to receive his ore upon the dump and thus have a partition of the ores in kind laid down to his hand upon the dump. To be sure, he has to give or tender his proportionate share of the cost of mining, but with the ore on the dump he has the means by which to raise the money if he does not have it otherwise. Much is said in counsel's argument about the right of partition as a remedy to get rid of the non-working co-tenant. But this remedy is a very inadequate one. The Court might judicially know that there is not a mine in Montana which can be partitioned in kind. The only way to partition is by sale. And when it comes to this, the poor co-tenant without means is absolutely at the mercy of the richer co-tenant with means. But under the provisions of this statute the non-working co-tenant can have a partition of the ores as they are mined and placed upon the dump. If the non-working co-tenant does not elect to take his share of the ore, he can allow the working co-tenant to mill the same or treat it otherwise at his own expense, subject, however, to the right to use the common product for the payment of these expenses, and thus share in the net profits. Bear in mind that the mining must be done in a miner-like manner, and that this applies to the treatment of the ores. All proper economy must be exercised and if there is anything of real value in the ore it is represented by the net profits, and the non-working co-tenant is secured in this act to his just share of the same. If it should turn out that the ore is of such little value that there is no profit, but a loss, the burden falls upon the industrious working co-tenant, whom the learned counsel in their unwonted zeal see fit to denominate robbers and despoilers.

The foregoing observations expose the unjustness of the criticism made upon this act. On the contrary, this act is most carefully drawn and guards the interests of the non-working

co-tenant with all the tenderness and care given by an affectionate parent to an infant child. The non-working co-tenant is the pet of this act. It does not injure him in any vested right which he may have. This act gives to the non-working co-tenant every dollar of the net profit which can be realized out of the mine. This is all that he has in it, or that he ever had in it. It even gives him the further right to take his own ores and treat them himself if he is not willing that his associates should treat them; and all he can make out of his share of the ores after the expenses of mining in a miner-like manner have been paid, he gets under the provisions of this act. Now wherein is he despoiled of his property?

The learned counsel lay great emphasis upon the right which they claim the non-working co-tenant has to have the ore remain in place until he should consent to its being mined or until the mine should be partitioned or sold. It must be remembered that in determining the right of one co-tenant in relation to his fellow co-tenant the nature of the property right of each must be taken into consideration. Each one has rights which the other must respect; the right of each is defined and fixed by law. There is no vested right in a refusal to consent to such use of the property as its nature will admit of. The act under consideration does not take away the property of the co-tenant, but it provides for the better use and enjoyment of the property.

Now we submit that the act under consideration cannot be void as an unconstitutional interference with private property. As we have seen, it gives every advantage to the non-working tenant; it enhances the value of his property. The possession of the property is valuable in proportion to the uses and enjoyment which can be gotten out of it. Counsel for appellants contend that one co-tenant has a vested right in his undivided interest in the common property to hold it without using it, no matter how detrimental such holding may be to the interests of his fellow co-tenant. This statute, we submit, adjusts the equities of the parties as nearly as possible according to natural justice.

In the first place, House Bill No. 1 is a remedial statute. It is the province of the legislature to determine by appropriate legislation the public policies of the state. The Supreme Court in the case of *A. C. M. Co.* v. *B. A. & P. Co.*, 17 Mont., proceeded upon the supposition that the act of 1872 and likewise the act of 1895 wrought a change in the common law as to the use and enjoyment of mining property. And the public were led to believe from this decision that one co-tenant could not work his mine and take out ore and get the money out of the same without the consent of his co-tenant. The legislature by House Bill No. 1 determined that such a rule regulating the use of mining properties was detrimental to the public good, and House Bill No. 1 was intended as a remedy for this defect. The purpose of the act then was purely remedial. It was not to divest any interest of one co-tenant out of him and vest it in the other co-tenant, or any other person. Its purpose and its very provisions, as we have seen, were to protect with the utmost care the right of the non-consenting co-tenant. Its purpose was to regulate the use of the property so as to enhance the value of the property to its owner. Ore in its natural place in the earth can contribute no rational enjoyment; nor be of any beneficial use to its owner while it is so situated, nor contribute any benefit to the public at large. To put it within the power of one owner by his non-action to preclude his co-tenant, who desired to use the property for that purpose for which it could be used, from using his property is not only impolitic but wrong in principle. House Bill No. 1 provides a remedy by which it is sought to prevent this injustice and to enable all the tenants in common in a mining property to enjoy to the fullest their several interests therein.

"The right to a particular remedy is not a vested right. It is the general rule, and the exceptions are of those peculiar cases in which the remedy is a part of the right itself. It is within the legislative province to give a new and additional remedy for a right or equity already in existence. It may abolish old remedies and substitute new. Any rule or regulation

in regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the province of legislation." (Cooley on Constitutional Limitations, 443 *et seq.*) Much has been said in appellant's argument about vested rights. But the question arises, What is a vested right in a constitutional sense? Upon this subject see Cooley on Constitutional Limitations, page 438 *et seq.* The change made by legislation in property which does not take the property away from the owner, but enhances its value, is not obnoxious to the constitutional provision protecting vested rights. Any such law which enhances the value of the property or promotes the beneficial use of the same and thus indirectly enhances the value, is not unconstitutional upon the ground that it interferes with vested rights. (*Annabele* v. *Patch*, 3 Pick. 363; *Miller* v. *Miller*, 16 Mass. 60.)

But appellant's counsel contend that "if the statute is purely remedial, it is invalid because it is repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, in that it denies to persons the equal protection of the laws." The answer to this is obvious. A law may be the law of the land without being a general law. Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens or be confined to particular classes, as minors or married women, bankers or traders, and the like." (Cooley on Constitutional Limitations, page 482, note 2.) And the legislature must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to subdivisions of a state or a single class of its citizens only. (*Id.*) If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character, and of their propriety and policy the legislature must judge."

Applying these elementary constitutional principles to the case under consideration we observe that House Bill No. 1, in that part of it affecting the working of mines, is made for a single class of persons, to-wit: Joint tenants and tenants in common. This is a particular class and this act affects property held in this particular mode. When a person acquires property under this kind of tenure he does it with the understanding that the legislature has power to make enactments regulating the ownership and use and enjoyment of this class of property different from other classes of property held by different kinds of tenure.

7. Appellant's counsel further contend that House Bill No. 1 is unconstitutional as to all rights which had accrued before its passage. In other words that it is retroactive and impairs the obligation of contracts and interferes with vested rights. *Our Constitution does not prohibit retroactive legislation.* It provides that the legislature shall not pass an act *ex post facto* and which impairs the obligation of contracts. But this is not prohibiting retroactive legislation. (Cooley on Constitutional Limitations, p. 456; *Beach* v. *Walker,* 6 Conn. 190-197; *Goshen* v. *Stonington,* 4 Conn. 209-221, 10 Am. Dec. 121, note p. 132; 1 Kent's Commentaries, p. 456.)

MR. JUSTICE PIGOTT delivered the opinion of the Court.

The former opinion in this case is reported in 24 Montana, at page 125, and in 60 Pacific Reporter, at page 1039. Being inclined to the view that, if the provisos of House Bill No. 1 of the Session Laws of 1899 (Laws of 1899, page 134, hereinafter referred to) are applicable to co-tenancies created prior to the passage of that bill, the injunction was probably too broad in its terms, we granted a rehearing, and the cause has been again argued. The facts upon which the original decision was based are stated in the former opinion. The following facts are pertinent to the question which we shall consider upon the rehearing: The plaintiff and the defendants Heinze are, and since 1893 have been, tenants in common of the Snohomish

and Tramway lode mining claims. The defendant administrator and the defendant Larkin, as heir, assert that the equitable title to the undivided interests of which the plaintiff is the legal owner is in the heir, but this is controverted by the plaintiff. The defendant Montana Ore Purchasing Company owns the Rarus lode mining claim, and this defendant and the defendants Heinze had entered the Snohomish and Tramway from the Rarus through underground workings of the latter, had mined large quantities of valuable ore from the veins of the common property, had hoisted and removed the same through the Rarus shaft, and had appropriated it to their own use,—all without the consent of the plaintiff. These acts they threatened to continue doing. In its former decision this Court reversed the order of the district court refusing to grant an injunction *pendente lite,* the effect of which was, in the particular case, a direction to the court below to issue the injunction as prayed, restraining the defendants from entering upon and mining the common property at any place. If the defendants who are co-owners with the plaintiff in the Snohomish and Tramway should sink a shaft or make an opening on either one of these claims, and mine and extract ore therefrom, a question different from that determined in the former decision would necessarily arise. The constitutionality of Section 592 of the Code of Civil Procedure, as amended by the Act of February 28, 1899, commonly known as "House Bill No. 1," would be involved; if it be constitutional when applied to the co-tenancy between the plaintiff and the Heinzes, and the defendants in mining and removing the ore through openings on the Snohomish or Tramway should bring themselves within the provisos of the Act, the injunction would be too broad. We think the Court is therefore in duty bound to determine whether the Act, if intended to be applicable to co-tenancies existing at the time of its passage, is, as to such co-tenancies, repugnant to the Constitution. The plaintiff argues that the Act attempts to deprive co-tenants whose estate existed when the Act of 1899 became operative, of their property without

due process of law, disturbs their vested rights, and is a law impairing the obligations of contracts.

We are satisfied that the provisos of House Bill No. 1 of the Laws of 1899 were intended to apply as well to co-tenants whose estates were in existence when the law was passed, as to those whose estates have been or may be created after its passage. Does the amendment made by the Act of 1899 to Section 592 of the Code of Civil Procedure disturb or impair the vested rights of co-tenants whose estates were in existence at the time the amendment became operative? If it does, it is repugnant to those parts of Sections 3 and 27 of Article III of the Constitution of the State declaring that all persons have the natural, essential and inalienable right of acquiring, possessing and protecting property, and ordaining that no person shall be deprived of property without due process of law. If it does, it is repugnant also to the "due process of law" clause of the Fourteenth Amendment to the Federal Constitution.

In 1845 the general assembly of Illinois passed the following statute, entitled An Act Concerning "Joint Rights and Obligations" (Rev. St. Ill. 1845, p. 299):

"Section 1. * *. * If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common.

"Sec. 2. If any person shall assume and exercise exclusive control [afterwards changed to 'ownership'] over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, tenancy in common or coparcenary, the party aggrieved shall have his action of trespass or trover for the injury, in the same manner as he would have if such joint tenancy, tenancy in common, or coparcenary did not exist.

"Sec. 3. All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants."

Section 2 received an interpretation in *Benjamin* v. *Stremple*, 13 Illinois, 466, and *Boyle* v. *Levings*, 28 Illinois, 314, decided in 1851 and 1862, respectively. These three sections were adopted by Montana. At the first session of the legislative assembly of the Territory of Montana an Act entitled "An Act Concerning Joint Rights and Obligations," approved February 8, 1865, was passed (Bannack Statutes, p. 454). It is as follows:

"Section 1. If any partition be not made between joint tenants, the property of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to execution or administration, and be considered to every intent and purpose in the same view as if such deceased joint tenants had been tenants in common.

"Sec. 2. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, tenancy in common or copartenary, the party aggrieved shall have his action of trespass or trover for the injury in the same manner as he would have if such joint tenancy, tenancy in common or copartenary did not exist.

"Sec. 3. All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants.

"Sec. 4. This act to take effect and be in force from and after its passage."

Thereafter the provisions of the Act of 1865 were included in an Act entitled "An Act revising, enacting and codifying the general and permanent laws of Montana Territory," the Act of 1865 constituting Chapter 36 of the compilation of 1871-72, the subject of the chapter being designated as "Joint Rights." In the subsequent compilation of 1887 the provisions of the Act of 1865 were re-enacted without change, appearing

as Chapter 77 of the general laws, and found at page 1006 of the Compiled Statutes of 1887, the chapter being entitled "Joint Rights." Until the adoption of the Code of Civil Procedure of 1895, the Act of 1865 remained in force as originally passed. For more than thirty years, therefore, the Act of 1865 constituted the only legislation of this territory and state touching the subjects affected by it. What, then, was the purpose and what the effect of these enactments, which were among the earliest legislative steps taken by the territorial government, and which remained for so long a time unchanged?

By its title the Act declares that the subject sought to be affected by its provisions is "Joint Rights and Obligations," and, as the third section of the law treats specifically of "Joint Obligations," it should seem clear that, if the title of the Act may be treated as any evidence of its meaning, sections 1 and 2 were designed to treat of "joint rights." It is hardly needful to observe that, if the provisions of the enacting portion of the statute actually depart from the purpose indicated by the title, they would not (under the Organic Act as it then was) be restricted by it; but if sections 1 and 2 render the meaning ambiguous, or leave the legislative intent doubtful, the avowed purpose of the legislation, as the purpose is declared in the title, would prove, at the least, of benefit in the effort to ascertain the design of that branch of the government whose purposes, when ascertained, must be respected and announced by the judiciary. We find that by the first section of the Act itself the legislative assembly plainly intended to destroy the right of survivorship which constituted the distinguishing feature of the species of tenure known as "joint tenancy," and the provisions and unmistakable purpose of the Act are thus far consistent with its title, for, manifestly, such a substantial modification of the rights of joint tenants deals exclusively with "joint rights," and accounts, at least in part, for that portion of the title which declares that the Act is one concerning "joint rights." We cannot agree with the courts which hold that the legislature has power to convert existing joint tenancies into tenancies in common;

the right of survivorship—the indispensable ingredient and characteristic of the estate, and not a mere expectancy or possibility, as, for example, is the inchoate right of dower—accrues as a vested right when and as soon as the joint tenancy is created, and the legislature is without authority to devest or interfere with such right. A joint tenant cannot be so deprived of his property. Constitutional limitations, state and national, prohibit it. We observe, therefore, that the first section was not and could not have been retrospective in its operation, but that it affected subsequently accruing rights only, which, in the absence of the statute, would have constituted joint tenancies. Turning, now, to the second section, and expecting, by reason of the terms of the title, to find that its provisions relate either to "joint rights" or to "joint obligations," we are surprised to find its language more suited to legislation concerning remedial procedure than to either of the subjects indicated by the title. It provides that if "any person" (not necessarily a co-tenant) "shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy, tenancy in common, or copartenary," then "the party aggrieved shall have his action of trespass or trover for the injury," and that this aggrieved party shall have such action "in the same manner as he would have if such joint tenancy, tenancy in common, or copartenary did not exist." Without consideration, for the present, of the significance of the word "any" in the first line of the section, and assuming that the section relates solely to co-tenants, what was its purpose and effect as to them? It declares that, under the circumstances described, "the aggrieved party (co-tenant) shall have his action of trespass or trover for the injury." A superficial examination of this provision would naturally induce the conclusion that it relates only to the remedy "for the injury" to an aggrieved co-tenant; but no very serious reflection is required to suggest the indisputable proposition that some, at least, of the acts recited in the section do not constitute "injuries" to the co-tenant, or make him an "aggrieved party,"

unless the statute modified the rights of co-tenants; for instance, no wrong was done under the common law if one co-tenant, without the consent of the other owners, in the proper way mined and took away the product from the subject of the common ownership which had been acquired for the purpose of mining, and was adapted to that use, or worked in a miner-like manner mines open when the co-tenancy was created, and removed the ores and deposits, although the value of the land might be lessened thereby.

Whether these sections worked a change in the law by creating rights not theretofore existing, or provided remedies only, is the important and difficult question presented in the case at bar. If merely remedial, then they did no more than provide additional means of redress for the violation of rights recognized at law or in equity. If, on the other hand, these sections created new rights in property, and incidentally prescribed remedies for the invasion of such rights, it will be sufficient, for the purposes of the present inquiry, to determine whether the supposed right asserted by the plaintiff was so created, and whether it became vested before the amendment of 1899 went into effect; and the extent of the changes made by the Act of 1865, with respect to the obligations and liabilities of co-tenants the one to the other need not be examined, except in so far as a discussion of them may be necessary to a clear understanding of the points here presented.

Before the passage of the statute of 1865, a tenant in common, although liable in trespass to his co-tenant for an unlawful destruction of the common property or of part of it, or of the interest of the co-tenant, had the right to "assume and exercise exclusive ownership over" (provided neither ouster nor conversion resulted), "or take away, * * * lessen in value, or otherwise injure or abuse" the common property (provided the act did not amount to ouster, waste, conversion, or unlawful destruction), and hence the exercise of that right could not operate as an "injury;" in other words: Under the common law one tenant in common is not aggrieved,—that is

to say, he has suffered no legal injury,—by his co-tenant's assuming and exercising exclusive ownership over, taking away, lessening in value, or otherwise injuring or abusing the common property, unless the act amounts to an ouster, to waste, to a conversion, or to an unlawful destruction of the common property or of some part of it, or of the interest of the other tenant. If, therefore, this section does not affect joint (or common) rights, as the title would indicate that it does, and if it relates exclusively to a remedy, it manifestly constitutes an attempt by the legislature to create a privilege to resort to a judicial procedure for the purpose of preventing the exercise of certain lawful rights; such an attempt would, of course, be futile, as it would exceed the constitutional powers of any legislative body, and hence such a purpose ought not to be attributed to the legislative assembly, unless no other construction of the law is consistent with the legislative purpose within the scope of its recognized authority. A remedy without a right to be protected thereby, or a wrong without a correlative right, is inconceivable. Although thus forced to reject the view that this section relates exclusively to remedial procedure, we are still impelled to recognize and concede the fact that it plainly purports to make provision for actions between cotenants which could not have been maintained prior to the Act, and that such actions should be maintainable by reason of certain wrongs which formerly were not wrongs and could not have constituted causes of action. Such, in effect, were the principles upon which *Benjamin* v. *Stremple* and *Boyle* v. *Levings*, *supra*, were based, and the statute bore this interpretation at the time it was adopted from Illinois. When a statute has been adopted by this state from another state, after a judicial interpretation, suitable to the conditions of this state, has been placed upon it by the parent state, the legislative assembly will, ordinarily, be presumed to have adopted the interpretation with the statute, and the courts will depart from it only for strong reasons. (*Stadler* v. *First National Bank of Helena*, 22 Mont. 190, 203, 56 Pac. 111.)

In view of this plain purpose, declared in unmistakable terms in the Act; in view of the fact that this purpose could be accomplished only by modifying the relations incident to co-tenancy and creating new rights in the co-tenants; and in view of the avowed object of the statute as declared in its title, the conclusion cannot be escaped that the legislative assembly clearly intended by this awkwardly worded section to alter substantially the rights of co-tenants, make violations of those rights constitute legal injuries, and designate the appropriate remedies for such injuries. We may observe also that it is only by this construction that the seemingly proper legal significance of the word "any" in the first line of section 2 is understood, for if this section is not intended to declare the rights and incidentally prescribe the remedies of co-tenaants *inter sese,* but merely regulates remedies, then it must be held to give a separate cause of action to each co-tenant against "any" person who does any of the things recited therein, and to entitle each co-tenant to maintain (though perhaps the judgment would be only for the amount of damages suffered by him) such an action against a stranger "in the same manner as he would have if such joint tenancy, tenancy in common or coparcenary did not exist." Possibly it may have been intended that as against a stranger committing any of the acts denounced as wrongs, a tenant might as sole plaintiff maintain trespass or trover to enforce his rights under circumstances where at the common law he would be required to join his co-tenants with him or, upon their refusal to join, make them defendants. Subject to certain exceptions, joint tenants and tenants in common must, by the rules of the common law, join in actions for damages resulting from tortious wrongs done to the common property; and if one purpose of the statute of 1865 was to permit a co-tenant when aggrieved by a stranger to recover as sole plaintiff for the injury suffered by him, it does seem somewhat peculiar that the statute prescribed the actions of trespass and trover as the forms to be employed in redressing his grievances, and omitted reference to those other actions—such as trespass

on the case, replevin, detinue and the like—which are the appropriate and exclusive remedies for many wrongs as serious as are those which may be righted by judgments in trespass or trover. We need not, however, determine whether the statute of 1865 enlarged the rights or remedies of co-tenants as against strangers; that question is not directly involved in the case at bar. Suffice it to say that the statute did create rights in co-tenants among themselves, and if the statute provided also rights or remedies, or both, in favor of co-tenants as against strangers, this provision in no wise affected the provision in respect of the rights of co-tenants *inter sese*. If in a case involving the rights and remedies of co-tenants as against strangers the determination should be reached that the statute of 1865 was designed to give rights or remedies as against strangers, such a decision would not militate against the conclusion which we have announced touching the rights of co-tenants among themselves; and, neither purpose being in conflict with the other, each would be recognized and made effectual.

Counsel in their learned and able arguments make incursions into the domain of ethics and make plausible suggestions touching the moral rights and remediless wrongs of co-tenants, which they assert existed prior to the Act of 1865, though they concede that no action or suit could be invoked to protect the rights or redress or prevent the wrongs; but we are of the opinion that the purpose of this section was to destroy those characteristics of tenancies in common wherein they mainly differ from holdings in severalty, leaving the necessity for voluntary or judicial partition as the chief remnant of the distinguishing features of this species of ownership,—in other words, the first and second sections, which concern "Joint Rights," practically convert a joint tenancy into a tenancy in common, and then convert tenancy in common into an estate with many (whether with all we need not decide) of the rights and privileges incident to several ownership and giving the actions of trespass and trover for their protection.

Having thus reached the conclusion that the second section

of the statute created new property rights in co-tenants, we must hold, as we have already held concerning the first section, that it could not under the organic law have been retroactive in its operation. As is admitted, the co-tenancy in the case at bar came into existence after the Act of 1865 became law and before 1895. For one co-tenant without the consent of the other to mine and remove ore from the common property is an unauthorized taking away and lessening in value of the property within the meaning of the Act of 1865; it is a permanent injury thereto (*Murray* v. *Haverty*, 70 Ill. 316; *Harrigan* v. *Lynch*, 21 Mont. 36, 52 Pac. 642), and the principle declared in the Act of 1865, at least as respects co-tenancies in quartz and placer mining claims, is that the common property shall remain an entirety until partition, and that no one of the owners may, without the consent of the other owners, work it or lessen its intrinsic value by mining and removing the ore or deposits.

With these views as to the force and effect of this early and long-standing legislation, we now approach the consideration of the more recent enactments concerning this subject. In the Code of Civil Procedure adopted in 1895, Section 2 of the Act of 1865 became Section 592, being a portion of Title III of Part II of that Code. Section 592 omits the word "copartenary" and also the words "of trespass or trover" from the language of Section 2 of the Act of 1865, but in other respects it is the same as section 2 of the original Act. We do not think that the placing of this so slightly modified section into the Code of Civil Procedure and into that part of it entitled "Parties to Civil Actions" is of real significance, or could possibly operate vitally to alter the legal meaning and effect of the long-established legislation; and this view is strengthened by Section 3454 of the Code of Civil Procedure, which is as follows:

"The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments." We therefore regard Section 592 of the Code of Civil Proced-

ure as a substantial re-enactment or continuance of the old Act of 1865, except in so far as it was modified by the omission of the words "of trespass or trover." In *Anaconda Copper Mining Company* v. *Butte & Boston Mining Company,* 17 Montana, 519, 43 Pacific Reporter, 924, this Court after an examination of the section, considered especially as an amendment to the previous legislation, held that its effect was to enlarge the remedies of co-tenants by permitting any appropriate action for such injuries as were contemplated by that section and the statutes substantially re-enacted by it; this case was followed by *Red Mountain Consolidated Mining Company* v. *Esler,* 18 Montana, 174, 44 Pacific Reporter, 523; by *Connole* v. *Boston & Montana Consolidated Copper and Silver Mining Company,* 20 Montana, 523, 52 Pacific Reporter, 263; and by *Harrigan* v. *Lynch, supra.* If the decision in the *Anaconda Case* deserves adverse criticism, as counsel for the defendants insist that it does, it is not because of the result reached, but rather because of the undue significance attached to the amendment omitting the words "of trespass or trover." It should seem that even under the Act of 1865 the tenant who was entitled to maintain an action of trespass against his co-tenant in the same manner as he would have if such joint tenancy or tenancy in common did not exist was, in the proper case, entitled to an injunction as an ancillary remedy to prevent a repeated or continuing trespass,—the right to such equitable aid not being the creature of the statute but arising under the operation of the principles of equity applicable to all cases of continuing and irreparable trespass, both in order to prevent a multiplicity of suits and in order to prevent the commission of a threatened legal wrong, for which, when done, an action at law for damages would be an inadequate remedy. We feel satisfied that injunction would be an appropriate auxiliary remedy in such a case, especially where, as in Montana, law and equity are administered by the same court and often in the same case; but in any event it is apparent from the authorities last cited that the remedy by injunction, if not granted by the Act of

1865, is granted by section 592, and the giving of this new remedy for an old wrong violates no constitutional right. With this understanding of the meaning and general purpose of the Act of 1865, with its light amendment of 1895, we now address ourselves to the amending provisos contained in the Act of 1899, commonly called "House Bill No. 1," and entitled "An Act to amend Section 592 of the Code of Civil Procedure of Montana, relating to property held in joint tenancy and tenancy in common." This Act is as follows:

"Be it enacted by the Legislative Assembly of the State of Montana:

"Section 1. That Section 592 of the Code of Civil Procedure of Montana, be and the same is hereby amended so as to read as follows:

"Sec. 592. If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value or otherwise injure or abuse any property held in joint tenancy, or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist.

"Provided: That nothing herein contained shall prevent one co-tenant or joint tenant or any number of co-tenants or joint tenants acting together less than all, from enterng on the common property at any point or points not then in the actual occupancy of the non-joining co-tenants or joint tenants and enjoying all rights of occupancy of the property, without waste; and in the case of mining property, from mining the same in a minerlike manner, and extracting, milling and disposing of the ore from the common property, paying its or their own expenses, and subject to accounting to the non-joining co-tenant or joint tenant for the net profits of such mining operations, if any made; and all liens for labor and materials incurred in such mining shall attach only to the undivided interest or interests of the working co-tenants or joint tenants, but nothing herein shall prevent or preclude the co-tenant or joint tenant, not joining in the operation of such mining property from re-

ceiving his, its, or their proportionate share of all ore or ores on the dump upon payment or tendering payment of the actual cost of mining the same."

If our interpretation of the second section of the Act of 1865 is correct, and if we are justified also in the opinion that the section, when so interpreted, could not be retrospective in its operation and could apply to and affect only estates created after the Act was passed, it seems quite clear that a like view must be taken with respect to the amendment of 1899 touching the working of a mine and the taking of ore therefrom by one tenant without the consent of his co-tenants; for it was plainly intended to restore to one class of co-tenants certain valuable rights which were taken away by the Act of 1865, and to deprive another class of valuable rights which were created by that Act. Careful examination of the amendment must, we think, result in the view that it could not impair any rights then existing and is therefore inoperative as to them; its language is not such as would seem appropriate for the purpose of any positive enactment, but is rather suitable as expressive of merely legislative construction. Its declaration is "that nothing herein contained shall prevent," and while, if such a clause had been inserted in the original Act of 1865, it would have operated as a restriction upon the legislative force of the main body of the section, yet, considered as an amendment, it must be regarded as trespassing upon the powers and functions of courts or as meaning that "nothing contained in this section shall so operate on tenancies hereafter created as to prevent," etc. The preventive force of an Act, as well as its positive effect, is to be determined by the judiciary and, though the legislative assembly may and often does alter existing statutes because of their legal meaning as ascertained and announced by the courts, the lawmaking power cannot determine the past legal force and effect of any statute; such power would involve the right to review and reverse the rulings of those tribunals to which the people have intrusted exclusively the power and duty of interpreting all Acts and determining both their positive force and

their preventive operation. Whatever rights are created or conferred by the amendment of 1899 did not exist theretofore and, unless we have erred in the views expressed as to the force and effect of the Act of 1865 and as to the vested rights of co-tenants under it before the amendment, the conclusion that the amendment does not apply to property rights of persons whose co-tenancies were created prior to the time it took effect must be correct. Our opinion is, therefore, that any co-tenant whose estate was created after the Act of 1865 took effect and before the amendment of 1899 became operative is entitled to restrain by injunction the commission by his co-tenant of any of the acts denounced in the original statute of 1865 and in Section 592 of the Code of Civil Procedure, provided, of course, that the remedy at law is inadequate and the threatened injury irreparable,—in other words, we do not consider that any rights in property conferred upon or taken away from co-tenants by the Act of 1865 are affected by the Act of 1899, and that the latter Act is only prospective in its operation. Further than they are involved in the case at bar we do not attempt to define the character or extent of the rights so created by the Act of 1865. In so far as the part of the amendment under consideration and affecting the present case was intended to apply to estates existing at the time the Act of 1899 became operative, it must be held to be an attempt to disturb or destroy vested rights, and therefore to be void. Whether the amendment is void as to the plaintiff upon the further ground that it impairs the obligation of a contract is a question which, being unnecessary to a decision, is reserved.

The order refusing an injunction is reversed and the cause is remanded.

Reversed and Remanded.

Mr. Justice Milburn, not having heard the argument, does not participate in the foregoing opinion.

Rehearing denied March 4, 1901.

CAPLICE COMMERCIAL CO., RESPONDENT, *v.* CASSIDY ET AL., APPELLANTS.

(No. 1,628.)

(Submitted February 5, 1901. Decided February 11, 1901.)

Mortgages — Foreclosure — Payment—Default—Interest—Pleading—Causes of Action—Demurrer—Dismissal as to One—Effect—Appeal.

1. Defendant rightly demurred on the ground that two causes of action had been improperly united in the complaint; the court, at the instance of the plaintiff, without objection by the defendant, dismissed the complaint as to the second cause of action, and at the same time overruled the demurrer, and no costs were taxed to defendant. *Held,* that the overruling of the demurrer, when considered with the dismissal, did not affect any substantial right of the defendant, and hence, under Section 778 of the Code of Civil Procedure, the judgment would not be reversed.
2. Where a mortgage—given to secure two notes—provided that in case of default in the payment of the principal as provided in the notes, or any part thereof, or if the interest thereon be due and unpaid for 30 days, the mortgagee could consider the whole principal expressed in the notes as immediately due and payable, a complaint which alleged one of the notes to be due and unpaid would support a judgment for the full amount secured, though, at the time the complaint was filed, 30 days had not elapsed after default in payment of interest.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by the Caplice Commercial Company against Terence Cassidy and others to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Affirmed.

Mr. J. E. Healy, for Appellants.

Mr. W. E. Carroll, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

From a final judgment entered against them the defendants have appealed. The plaintiff has neither filed a brief nor made an oral argument. Counsel for the defendants presents two questions for consideration:

1. The order for the trial court overruling the demurrer to the complaint is specified as error. Two causes of action were stated, and the defendants demurred on the ground that the causes had been improperly united. Without objection by the defendants and presumably at the instance of the plaintiff, the court dismissed the complaint as to the second cause of action and at the same time overruled the demurrer. The demurrer was well interposed, for the causes of action were such as may not properly be united in the same complaint; but the dismissal of the action as to one of them removed the ground of objection made by the demurrer. As it does not appear that the costs prescribed by Section 1861 of the Code of Civil Procedure were paid by or taxed to the defendants; and as the plaintiff, presumably before the decision on or even the submission of the demurrer, exercised the privilege of dismissing his complaint as to the second cause of action, and as an order thereafter made sustaining the demurrer and requiring the plaintiff to pay the costs prescribed by Section 1861, *supra*, would have been erroneous, manifestly the overruling of the demurrer when considered with the dismissal did not affect any substantial right of the defendants. The judgment will not be reversed when it is clear that the error urged was of such character. This is the rule declared in Section 778 of the Code of Civil Procedure and by *Murphy* v. *Patterson*, 24 Montana 591, 63 Pacific Reporter 380.

2. The first cause of action was based upon two promissory notes made by the defendants Cassidy, the payment whereof was secured by a mortgage executed by the Cassidys simultaneously with the notes. Defendant Rowan was made a party because he asserted some interest (subsequent and subject to the lien of the plaintiff's mortgage) in the property. The relief sought was a judgment of foreclosure. Each note was dated September 9, 1899, and was for the sum of $500, with interest thereon at the rate of 12 per cent. yearly from date until paid, interest payable monthly. According to their terms one of the notes fell due on the 9th day of September, 1900, and the other

will mature on the 9th day of September, 1901. The mortgage contained these provisions: "But these presents shall be void if such payment be made; but in case default shall be made in the payment of the said principal sums of money, or any part thereof, as provided in said notes, or if the interest that may grow due thereon, or any part thereof, shall be due and unpaid for the space of thirty days after the same should have been paid, according to the terms of said promissory notes, then and from thenceforth, it shall be optional with the said party of the second part * * * to consider the whole of said principal sum expressed in the said notes as immediately due and payable, although the time expressed in the said notes for the payment thereof shall not have arrived; and immediately to enter into and upon, all and singular, the premises hereby granted, or intended so to be, and to sell and dispose of the same, or any part thereof, and all benefit and equity of redemption of the said parties of the first part, * * * according to law, and of the money arising from such sale to retain the principal and interest which shall then be due on the said promissory notes," —which were followed by the language usual in such instruments. The complaint was filed on the 11th day of September, 1900. It contains a copy of the mortgage and states that all of the interest on the notes had been paid up to and including August 9, 1900; that more than thirty days have elapsed after the interest accruing thereon should have been paid according to the terms of the notes, and that plaintiff has exercised the option given in the mortgage to consider the principal sums of the notes as immediately due and payable upon the default in the payment of the interest. The complaint further states that the note which matured on the 9th day of September, 1900, is due, owing and unpaid, and that the note which upon its face was to become due on September 9, 1901, is also unpaid; and the plaintiff declared the principal sums expressed in the notes as due and payable; the allegation was also made that payment of the notes was demanded but refused. The defendants did not in any way attack the statement of this cause of action;

the default of the defendants for want of further appearance or answer having been entered, the court after hearing evidence, found, among other things, that the defendants Cassidy had made default in the payment of the notes, and that by the terms of the mortgage both notes became due and payable on the 9th day of September, 1900, and remained due, owing and unpaid together with the interest thereon from August 9, 1900. Judgment was rendered accordingly, declaring that the principal sums of, and the unpaid interest accrued on, the notes, together with costs and counsel fees, were a valid lien upon the property mortgaged, and directing that the property be sold to satisfy the amount due to the plaintiff.

It is contended here that the complaint does not state facts sufficient to warrant the finding that the note which by its terms will fall due on September 9, 1901, was due by virtue of the exercise of the option granted by the mortgage. In support of this contention counsel argues that the note could not be considered as mature under the terms of the mortgage until 30 days after the 9th day of September, 1900, the interest having been paid up to and including the 9th day of August, 1900. His position is that the interest must have been due and unpaid for 30 days after it should have been paid, in order to permit the holder of the note to consider the note as due. It is true that the note did not become due by reason of any failure to pay the interest, for the interest having been paid to August 9, 1900, the next payment was to be made on September 9th, and not until 30 days had elapsed after the interest should have been paid, to-wit, not before October 9th, could the plaintiff for this reason declare the principal sum of the note to be due. If this were all, counsel would be right; but he overlooks the allegation that the note which matured on September 9, 1900, was not paid. In legal effect the mortgage provided that if default should be made in the payment of the principal of either note, or any part of either, as provided therein, then and thenceforth the holder should have the option to consider the whole of the principal sums of both notes as immediately due and

payable, although the time expressed therein for payment had not arrived; and the complaint alleges, as counsel in his brief concedes, that the principal sum of each note remained unpaid when the complaint was filed. One of the notes was due and payable on September 9, 1900. Failure to pay the principal thereof at maturity was, by the terms of the mortgage, sufficient cause for the holder to consider both notes as immediately due. The thirty-day period was applicable to a default in the interest, but not to the failure to pay the principal of the note first maturing; this is manifest. At the time the complaint was filed one of the notes was due and its principal sum wholly unpaid; the plaintiff had the right to consider the other note as immediately due and payable, and this right or option it exercised and declared by demanding payment of both notes and by commencing this action.

The judgment is affirmed; let *remittitur* issue forthwith.

Affirmed.

WETZSTEIN, APPELLANT, *v.* BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO., RESPONDENT.

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(Nos. 1,516 and 1,526.)

(Submitted January 16, 1901. Decided February 11, 1901.)

Injunction pendente lite—Discretion—Appeal.

Before final decision on appeal from a decree finding plaintiff was not the owner of any interest in certain mining property, it was not an abuse of discretion for the trial court to refuse to grant said plaintiff an injunction *pendente lite* against the original defendant's successor in interest in a subsequent action, in the same court, wherein plaintiff's claim of title was identical with that of the original suit.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION to quiet title by Adolph Wetzstein against the Boston & Montana Consolidated Copper & Silver Mining Company. From an order denying an injunction *pendente lite,* plaintiff appeals. Affirmed.

Messrs. McHatton & Cotter, for Appellant.

Messrs. Forbis & Evans and *Mr. Wm. H. DeWitt,* for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This is an appeal from an order denying an injunction *pendente lite.*

The injunction was asked for pending an action in the district court to quiet the title in plaintiff to a certain interest in the Comanche mining claim, and for an accounting to him for his interests in the profits of said mining property, and for a receiver. It appears from the complaint, filed December 14, 1899, that on the 22d day of March, 1894, plaintiff commenced a certain other action in the same court against the predecessors in interest of the defendant in the action at bar, claiming title to the same interest in the said mining property, and praying that the court order a conveyance to be made to him for said interest in said property; that the action last referred to was tried before a jury, which returned special findings adverse to plaintiff; that these findings were adopted by the court, with additions; that on or about January 3, 1899, a decree against the plaintiff was made and entered; that plaintiff's motion for a new trial was denied and an appeal was taken and is now pending. Plaintiff asked for the injunction to restrain defendant from mining, extracting, carrying away, or converting to its own use any ores from said mining property, in the possession of which it has been since 1896.

In the light of the fact, together with others not necessary to state, appearing to the district court, that it had in the action

commenced in 1894, as aforesaid, found and decreed that the plaintiff was not the owner of any interest in said mining claim, the decree not having been reversed or set aside, we cannot see any abuse of discretion in the action of the lower court in refusing to grant the injunction asked for.

The temporary injunction heretofore by this Court granted pending this appeal, the application for which is numbered 1,516, is hereby dissolved.

The motion of plaintiff filed and submitted February 8, 1901, requiring the defendant to give him a bond to protect him pending this appeal, is, in view of the above opinion, denied.

Order appealed from is hereby affirmed.

Affirmed.

BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING CO., APPELLANT, *v.* MONTANA ORE PURCHASING CO. ET AL., RESPONDENTS.

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(No. 1,559.)

In the matter of the petition of the respondent Montana Ore Puchasing Co.

(Submitted February 16, 1901. Decided February 16, 1901.)

APPLICATION for leave to file a petition for a rehearing on the question of the qualification of F. Augustus Heinze as surety on a bond. Application denied.

Messrs. Forbis & Evans and *Mr. Wm. H. DeWitt*, for Appellant.

Messrs. McHatton & Cotter and *Messrs. Toole & Bach*, for Respondents.

Opinion and order: *Per Curiam.*

The petition of the respondent Montana Ore Purchasing Company praying the court to grant a rehearing on the question of the qualification of F. Augustus Heinze as surety on the bond or undertaking of $550,000 heretofore filed in the action above entitled, or, in the alternative, that a re-examination of said Heinze as surety on said bond or undertaking be allowed, so as to enable him to give a detailed statement as to the value of all his property, to the end that the Montana Ore Purchasing Company and said Heinze may thereby be enabled to protect themselves as to their credit and financial standing, and praying also that the record of the examination of said Heinze as surety be corrected in respect of certain alleged errors referred to in the petition, is presented in open court, together with the affidavits of F. Augustus Heinze and Arthur P. Heinze in support thereof, and leave is asked to file the same, which motion the Court takes under advisement:

And now, upon consideration of the subject-matter of the petition, the Court is of the opinion that no further proceeding is necessary, since no just or fair construction of the language used in the order of January 22, 1901, touching the qualification of the sureties on the additional bond, can be made to the effect that the Court believed or held that as a matter of fact the said F. Augustus Heinze was or was not worth as much as he claimed to be, namely, ten million ($10,000,000) dollars. The Court is of the opinion that the only reasonable construction of which the language of the order is susceptible is that upon the evidence as submitted it did not appear that said Heinze had qualified in a sum in excess of the sum of $200,000, named in the Court's order, over and above his liability on the previous bond, exclusive of the stock owned by him in the Montana Ore Purchasing Company, as it was apparent to the Court

that the surety did not describe in detail the property which he claimed to own, his reference to his property being with some exceptions in general terms, and not of sufficient particularity to give the Court the information necessary on a hearing for the purpose of justification.

It appearing therefore that the Court did not decide or intend to hold that said F. Augustus Heinze was financially responsible (after excluding his shares in the capital stock of the Montana Ore Purchasing Company) to the extent of $200,000 only, but did determine simply that the evidence as taken and reported at the particular hearing failed to show that said Heinze had qualified as surety for more than $200,000 upon the additional bond or undertaking required to be given by the order of December 5, 1900, and that said order could in no wise be interpreted as declaring him to be actually worth less than the amount ($10,000,000) which on the hearing he asserted the net value of his property to be, without properly specifying the various items thereof, going to establish his qualification in an amount exceeding $200,000; and it further appearing that the order of January 22, 1901, was in all respects correct upon the evidence as taken and reported:

The Court orders that the application for leave to file said petition be and the same is hereby denied.

Denied.

HEINZE ET AL., RESPONDENTS, v. KLEINSCHMIDT, ADMINISTRATOR, ET AL., APPELLANTS.

(No. 1,542.)

(Submitted October 4, 1900. Decided February 25, 1901.)

Mines and Mining—Tenants in Common—Partition—Receiver—Record on Appeal.

1. In a suit for partition between tenants in common a court of equity has power to appoint a receiver; but this power should be exercised with great

caution lest injury be done to the rights of a co-tenant, hence in any such case where an appointment is sought there must be shown a legal or equitable right, reasonably clear and free from doubt, attended with danger of loss, and that no injury will result to the party whose rights are thus invaded.

2. Mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a co-tenant who has brought a suit for partition, and the mere fact that the care of the property involves considerable expense, will not authorize the appointment of a receiver pending the final hearing of the suit.
3. Where a co-tenant has gone into possession of mining property by consent of his co-tenant, with the understanding that he was at liberty to engage in mining, nothing short of a clear ouster and refusal to account, coupled with insolvency, would justify a court in taking the property from him through the agency of a receiver.
4. Under Section 592 of the Code of Civil Procedure, each tenant in common has the right to have mining property stand as it is until it is finally partitioned, and to justify a court in invading this right and mining the property through a receiver there must be a very clear showing.
5. Where a record on appeal contains much matter impertinent and immaterial, the party offending in this particular will be subject to the payment of costs.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by F. Augustus Heinze and another against Carl Kleinschmidt, administrator of the estate of John D. Allport, deceased, and others. From an order appointing a receiver certain defendants appeal. Reversed.

STATEMENT OF THE CASE.

On January 22, 1900, the plaintiffs began their action in the district court of the Second judicial district to obtain a decree of sale for the purpose of partition of the Minnie Healy (patented) lode claim, situate in Silver Bow county. The complaint alleges that defendant Kleinschmidt is the administrator of the estate of John D. Allport, who died in October, 1895, and that the other defendants, except Miles Finlen, are his heirs at law, each being entitled to an undivided one-fifth interest in intestate's estate, subject to the possession of the said Kleinschmidt for the purposes of administration; that at the time of his death said Allport was seized in fee and was in possession of an undivided one-fourth interest in the Minnie

Healy claim, the same being now in the possession of the defendant Kleinschmidt under his trust; that plaintiff Heinze is seized in fee and in possession of an undivided five-eighths, and the Johnstown Mining Company of an undivided one-eighth interest therein; that plaintiff Heinze is also the equitable owner of an additional one-twentieth of the said claim, which is the interest therein inherited by defendant Caroline V. Kelley as heir of said Allport; that defendant Finlen asserts an interest in the claim, and particularly title to the interests belonging to plaintiffs, but without any foundation in fact therefor; that the said Kelley, aided and abetted by Finlen, heretofore presented to the district court of the Fifth district (the same court which granted letters of administration to Kleinschmidt) a certain paper purporting to be the last will of John D. Allport, and devising the whole estate to said Kelley, and proposed the same for probate, but that said court, upon a hearing, had declared the same a forgery; that before the bringing of the present action said Kelley had entered into an agreement with Finlen by which she had bound herself to convey to him all her interest in the claim; that Finlen had thereafter, for a valuable consideration, assigned to plaintiff Heinze his rights thus acquired from Kelley, but that Kelley, with notice of Heinze's rights under his assignment from Finlen, had conveyed her interest by deed to Finlen, who took and holds the same as trustee for Heinze, subject to the payment to Finlen of $5,000, the amount he paid Kelley therefor, which said Heinze is ready and willing to pay; that notwithstanding these facts Finlen claims this interest as his own; that Finlen, by reason of his contract with Kelley, pretends and claims to have some right or interest in the other undivided four-twentieths of the Minnie Healy claim, which belonged to John D. Allport at the time of his death, but that such claim is without foundation in fact; that, aside from the claims of Finlen thus made, the rights of all parties are free from adverse claims or incumbrances of any kind or character; and that the property, being valuable almost solely by reason of the copper ores de-

posited therein, cannot be partitioned otherwise than by a sale and distribution of the proceeds among the parties entitled. The Court is asked to determine the rights of the parties and decree the sale.

On January 30th thereafter the plaintiffs filed their verified petition in this cause, asking for the appointment of a receiver pending the final hearing, alleging as grounds for relief the following: That the defendants Kleinschmidt, as administrator of Allport, and Mary A. Miller, having entered into the possession of the whole of the Minnie Healy claim and the workings therein, are now, and for a long time past have been, extracting, removing and converting to their own use the ores therein, excluding the plaintiffs therefrom and refusing to render them any account; that said defendants assert the right to occupy and possess the whole of the claim and to extract the ores therefrom, and that they will refuse to render the plaintiffs any account thereof, or to pay over to them any part of the proceeds thereof; that plaintiffs are entitled to receive their proportion of the net values of all ores which may have been or which shall hereafter be taken from the claim by said defendants, and, but for the facts hereafter alleged, would be entitled to join with them in working the claim upon payment of their share of the expenses of mining, or to receive upon the dump their proportion of the ores taken out; that the defendant Miles Finlen, in order to harass and annoy plaintiffs, and to cast a cloud upon their title to the Minnie Healy claim by fraudulent and false adverse claims thereto, and to prevent them from having the use of their property and from developing the same by mining and extracting the ores therefrom, theretofore began an action in the district court of the Second district wherein he falsely and fraudulently asserted that he had an interest in said claim and had been in possession thereof, and that the plaintiffs forcibly and without his consent had ousted and ejected him therefrom and had taken possession thereof, and that they would mine and extract the ores therefrom and convert them to their own use in violation of his rights; that

in said action, by reason of said false and fraudulent pretensions and claims on his part, he procured said court to issue an injunction against the plaintiffs restraining them from doing any mining upon the property or removing ores therefrom; that said action is pending and undetermined, and cannot be tried for a long time to come; that, after the procuring of said injunction as alleged, the said Finlen, for the purpose of further annoying plaintiffs and obstructing them in their enjoyment of their rights, began an action in said district court against John Devlin, Marian Devlin and Mary E. Reilly, who for a long time prior thereto had been the owners of an undivided three-fourths interest of the Minnie Healy claim, as the predecessors of the plaintiffs, and falsely and fraudulently claimed to be entitled to a conveyance from them of their interests; that said action was thereafter transferred to the United States circuit court of the Ninth circuit, district of Montana, and that plaintiffs, having intervened therein, have set up their rights and asked to have their title quieted; that said proceeding is pending, and cannot be heard and determined for a long time to come; that the effect of the injunction so procured as aforesaid is not only to prevent the plaintiffs from working the Minnie Healy claim, but also to prevent them from receiving from their co-tenants in possession, the said Kleinschmidt and Miller, their proportion of the ores extracted from the property by them, or of the net value of the same; that said defendants, by reason of the pendency of the said injunction, will not and cannot account to the plaintiffs for the value of any of the ores extracted, and cannot and will not deliver to them upon the dump their proportion thereof; that the cost and expense of maintaining the claim in idleness during the determination of the various suits aforesaid, as well as the present action, will be about $500 per month; that the claim contains bodies of valuable ore, which can be readily mined and extracted, and that it is to the best interest of all of the owners or parties interested therein to have the same extracted and to have min-

ing operations conducted therein, to the end that it may be properly preserved and developed and its value thereby increased; and that unless the ores are so mined and disposed of, and the proceeds preserved, the owners of the said claim, and particularly the plaintiffs, may suffer great loss, by reason of the probable decline in the price of copper pending the litigation over the title,—the injunction bond required of said Finlen not being sufficient to protect the plaintiffs from probable loss.

The petition further alleges that there is a certain vein, bearing copper, gold and silver, which has its top or apex within the boundaries of the said Minnie Healy lode claim, and which on its dip or incline departs from the perpendicular in its downward course to the north; that the development so far upon said vein indicates that it passes beyond the side lines of the Minnie Healy claim and enters into the Piccolo and Gambetta lode claims beneath the surface; that these latter claims are immediately north of the Minnie Healy claim and are owned by the Boston & Montana Consolidated Copper and Silver Mining Company, which for a long time has been mining and extracting ores therefrom by means of underground workings; that plaintiffs are informed that the said Boston & Montana Consolidated Copper and Silver Mining Company is now engaged in carrying away and converting to its own use large quantities of ores from the said vein belonging to the Minnie Healy claim; that to prove the identity and continuity of the said vein from its apex in the Minnie Healy claim into the workings of the Piccolo and Gambetta claims will require a large amount of development work and entail a large outlay of money; that heretofore defendant Miles Finlen commenced an action in the district court of the Second district for an injunction to restrain the said Boston & Montana Company from mining and carrying away any of the ores from said vein; that said defendant, before obtaining an injunction, however, desisted from prosecuting said suit and permitted said Boston & Montana Company to continue its mining operations on the

vein, without further developing the same from the apex downward to prove that it belongs to the Minnie Healy claim, thus acquiescing in said trespass; that the injunction obtained by Finlen against the plaintiffs as alleged was designed to prevent them from prosecuting the work necessary to make such proofs, notwithstanding said Finlen believes that said vein has its apex in the Minnie Healy claim and the said corporation is trespassing thereon; that plaintiffs believe that the vein belongs to the Minnie Healy claim; that the ores which can now be mined therefrom have a value in excess of $100,000, and that if this fact can be shown it will establish a value for the claim of several hundred thousand dollars; that it is to the interest of all the parties to have this work done at once, to the end that an injunction be obtained to restrain further trespasses; that it is also to the interest of all parties that the ores in the claim be extracted; that their proceeds, so far as necessary, be devoted to this development work, to the keeping of the property in repair, to the prosecution of any suits necessary to restrain the said trespass or any other trespass, and to have the balance preserved for the parties entitled under the decree of partition when finally made.

Upon the filing of this petition an order to show cause was issued and set for hearing on February 5th. At that time the plaintiffs presented their evidence. The defendants Finlen and Kelley did not appear, both being absent from the state and neither having been served with summons or notice of the hearing. The other defendants entered their appearances by counsel without service of process, but made no resistance to the petition. The matter was then submitted, but no decision having previously been rendered, the defendants Kelley and Finlen entered their appearances by counsel on February 17th and asked to be heard. Leave was granted. Thereupon they answered by counsel, denying the material averments in the complaint and petition, including all allegations as to wrongdoing on their part, and introduced evidence controverting them. Thereupon the court, after consideration, made an order

appointing one E. H. Wilson as receiver with power: to take possession of all the interests in the Minnie Healy claim to which the plaintiffs assert ownership, including the Kelley interest, and to enter into all the workings and ore bodies therein with the administrator of Allport and the heirs other than Kelley; to operate the mine in all portions not in possession of the administrator and the Allport heirs; to have reduced all ores extracted; to expend the proceeds in keeping the mine in repair; to do development work sufficient to demonstrate the ownership of the veins being worked in the Gambetta and Piccolo claims, which plaintiffs believe have their apexes in the Minnie Healy claim; to demand and receive from the heirs of Allport and the administrator accountings for any mining operations conducted by them in any of the workings of the claim; and to prosecute any actions necessary in his judgment to protect the property from depredations by any person pending the litigation.

The receiver is expressly directed to extract only so much ore as may be necessary to pay expenses and to accomplish the duties assigned him in the order. The defendants Kelley and Finlen have appealed.

Mr. William Scallon, Mr. J. K. MacDonald and *Mr. T. J. Walsh,* for Appellants.

Messrs. McHatton & Cotter, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the Court.

The only question presented to this Court is whether the evidence submitted to the court below was sufficient to authorize the order of appointment. A determination of this question requires an examination of the evidence tending to support the averments in the petition. We have set forth in the statement particularly the contents of the complaint and petition,

for the reason that they were treated at the hearing as affidavits, and so far as they tend to establish any material fact they are considered as a part of the evidence.

Though there is evidence tending to show that a controversy exists between Finlen and the Allport heirs, other than Kelley, touching the present ownership of the Allport interest, and growing out of the contest over the probate of the alleged will of Allport, it is admitted in the pleadings that Allport died intestate, and that the defendants, other than Finlen, are his heirs at law. We shall therefore assume, for the purpose of this investigation, that each of them, except Kelley, is now the owner of an undivided one-twentieth of the property in controversy. Kelley has no interest in the property, nor in this controversy, except so far as she may be bound under her agreements with Finlen, as appear hereafter, to prosecute to a successful issue the probate of the alleged will, and thus make good to him her title to the entire Allport interest. At the time this hearing was had the will had been declared a forgery, as alleged in the petition. It is admitted, however, that a motion for a new trial was pending, and that the controversy as to the ownership of this interest is still undetermined. It appears that at the death of Allport in 1895, John Devlin, Marian Devlin and Mary E. Reilly were tenants in common with him in the property, owning the other three-fourths. It further appears that Finlen now holds the legal title to a one-twentieth interest by deed from Kelley, dated May 22, 1899, executed in pursuance of an agreement contained in a prior lease dated October 16, 1896, by which she bound herself upon certain conditions to convey to Finlen the entire Allport interest. The deed just mentioned also conveys to Finlen any interest Kelley may acquire under any decree which may be rendered in the proceedings looking to the probate of the alleged Allport will. It is shown that Finlen on October 16, 1896, became a lessee of the interests of John and Marian Devlin and Mary E. Reilly, with the right of purchase upon compliance with the terms of the leases on or before February 3, 1900. The conditions of

this lease and the one from Kelley were the same. There is no controversy but that the conditions contained in these leases have been fully complied with in all respects. It further appears that the Devlins and Mary E. Reilly subsequent to the making of the leases to Finlen conveyed their interests to the plaintiffs,—five-eighths directly to Heinze on June 3, 1899, and one-eighth to the Johnstown Mining Company through mesne conveyances dated, respectively, November 12, 1898, and May 18, 1899. The plaintiffs claim that Heinze made a verbal agreement with Finlen on November 21, 1898, which was subsequently executed, whereby Finlen bound himself to transfer and set over to Heinze his rights under the leases from Kelley, the Devlins and Reilly, and that the plaintiffs are therefore properly vested with the title to the Devlin and Reilly interests, and that Heinze is entitled to the Kelley interest. This is disputed by Finlen, who has a suit pending in the United States circuit court against the Devlins and Reilly, and also plaintiff Heinze, who has intervened therein, to compel a conveyance to him according to the terms of the lease. This defendant has also a suit in the district court of Silver Bow county against the plaintiffs, in which he seeks to eject them from the Minnie Healy claim. In this suit an injunction was issued restraining the plaintiffs from working the property pending a trial. These are the suits referred to in the petition as being founded upon fraudulent claims; they having been brought, it is alleged, to harass and annoy plaintiffs and to prevent them from the enjoyment of their property, and for no other purpose.

The situation of the title is, therefore, such that, if Fnlen should succeed in his suits now pending, the plaintiffs would have no interest in the Minnie Healy claim. The partition decreed in this case, if any at all, would then be between him and the Allport heirs, other than Kelley, subject to the administration. If the Allport will should finally be admitted to probate, the whole property would belong to Finlen. If the plaintiffs should succeed in these suits, they would be tenants

in common with the Allport heirs, except Kelley, or, if the will should be established, the owners of the entire property. With the merits of these controversies we have nothing to do on this appeal. At present we are concerned only with the fact of their existence, and the purposes and motives actuating Finlen in connection with them. As to the charges of bad faith and wrongdoing on the part of Finlen in the bringing of these suits, and his sinister purposes therein towards the rights of the plaintiffs, there is nothing in the evidence to support them, beyond the fact that these suits have been brought and are now pending. There is nothing to show that he brought them in bad faith, or that he has any other purpose therein than to have his rights declared. If he thought at the time they were brought that he was entitled to conveyances from the Devlins and Reilly, and that the plaintiffs were invading his rights, it was entirely proper for him to seek appropriate redress from all of them. Nothing else appearing, a presumption of good faith and proper motive must be indulged in his favor. Moreover, the fact that the district court issued an injunction in connection with the ejectment suit and after a hearing thereon, justifies the inference that that court was of the opinion that the plaintiffs are probably wrong in their claims. They had an opportunity on that hearing to show that the claims of Finlen are fraudulent and without foundation, as well as that the motives prompting him are malicious,—yet it seems they did not avail themselves of this opportunity. That Finlen brought suit to restrain alleged trespasses upon the Minnie Healy claim by a third party through the workings in the Gambetta and Piccolo claims, and did not prosecute it vigorously, furnishes in itself no ground for the charge that he is acquiescing in wrongs to plaintiffs by such third parties. He was and is under no obligations to plaintiffs to press this suit. He may have desisted because of an apprehension that he could not succeed; or because he became satisfied that he was wrong; or because he had some satisfactory arrangement with the corporation about compensation. In any event, it comes with ill grace from the plaintiffs to in-

sist that any obligation rests upon him in this connection, while they deny that he had any interest in the property, there being nothing in their way, until they procured the appointment of the receiver in this case, to prevent them from bringing and prosecuting any suit necessary to protect their own rights. If they had the requisite information, the obligation rested upon them to protect the rights which they now assert, and not upon Finlen. They were in possession at the time they began this suit; with the knowledge of the facts touching trespasses, which their charges against Finlen imply that they had at the time, they could easily have invoked successfully the preventive power of the court, even without additional exploration.

Passing now to an examination of the charges of wrongdoing on the part of the administrator and Mary A. Miller, we notice first that they entered their appearances in this case without service of process, and, though accused of ousting the plaintiffs from possession, and refusing to render any account of their alleged operations, they made no attempt to justify or deny the charges. They thus impliedly, at least, confessed the truth of them. Finlen and Kelley undertook to show that no real ground for the allegations in this connection existed, and that these two defendants, in collusion with plaintiffs, had attempted to bring about a situation upon which the court would be justified in taking charge of the property.

The facts are: On January 8, 1900, the administrator applied to the district court having jurisdiction over the estate for permission to engage in mining the Minnie Healy claim. This application was denied. After that time, and until this suit was instituted, plaintiff Heinze and he had various consultations about engaging in operations there, though Heinze was then enjoined from doing so. On January 22d this suit was brought, the plaintiffs then being in possession. On January 23d Heinze formally delivered possession to the administrator, including a large amount of supplies belonging to the plaintiffs, with the machinery used by them in operating the property prior to the Finlen injunction. Just previous to that

time Heinze had told the administrator that he (the administrator) could operate the mine if he chose to do so, provided the ore taken out should be shipped to Heinze. P. E. Mahoney, the night watchman in charge of the machinery at the mine, remained there just as before, as did also Sullivan, the day watchman. The former was sworn as a witness. He testified that he had never been hired by Kleinschmidt, but always, even up to the time of the hearing, took his orders and expected his pay from Heinze. "Heinze was his boss." He thought Sullivan was employed in the same way as himself, their duties being the same. His business was to keep up fires and keep things from freezing. Very little, if any, work was done after January 22d or 23d; and he saw no ore taken from the mine, except one wagonload which he caught a man stealing. No ore was hoisted from the mine after the date last mentioned. Some men were passing in and out, and some work was done; there being not more than a dozen men employed. Kleinschmidt and his foremen were there now and then; but Mary A. Miller was never there, and no one was there to represent her. Other evidence showed that she had not been in the state for several months. One Halford made affidavit on February 5th that Kleinschmidt and Mary A. Miller had been in exclusive possession of the mine and operating it since about January 25th, and had "shipped certain ore." Plaintiff Heinze made an affidavit that he had theretofore caused demand to be made upon Kleinschmidt and Miller for a statement of their operations, but none had been made. A mining engineer in the employ of plaintiffs also made an affidavit that on February 3d he had made an application for an inspection of the mine, but had been refused admission by "the representatives of the working defendants, though they knew that the application was on behalf of plaintiffs." These statements were all made under oath, in face of the fact that Mary A. Miller was not in the state at the time the alleged operations were carried on and the demands made, and without any showing that she had any one in the state to represent her in any enterprise whatever. It may not pass un-

noticed, either, that the application for the inspection was made on the 5th day after the petition was filed in this case, and that no time is fixed at which the statement of the operations was demanded. The same may be said as to the amount of the ore Halford saw shipped, and the date of the shipment. His affidavit is silent on these points. An officer into whose hands some papers had been put for service upon Kleinschmidt and his alleged foreman, one Kane, went to the Healy mine on February 1st; he then found the day watchman engaged in the same kind of duties as those performed by the night watchman, but no mining operations were going on; nor did he afterwards find any one engaged at work there, though often there until February 16th. We have patiently examined the whole record, and the affidavit of Halford is the sole bit of evidence, apart from the general averments made in the petition, which was verified by Heinze, tending to show an ouster by Kleinschmidt. There is nothing whatever to show any wrong on the part of Miller. The evidence is well-nigh conclusive that no mining was going on at any time after February 1st, and that neither Kleinschmidt nor any one representing him was at the mine after that time. The statement by Heinze that an account of the operations was demanded, and that none was rendered, is of no significance, in view of the fact that it does not appear when such demand was made, nor whether any opportunity was allowed for compliance by the administrator, so that the presumption might be indulged that the administrator was unwilling to comply. Heinze was sworn and examined fully at the hearing—his silence in connection with this matter is significant, especially so in view of the fact that the mining operations, if any, conducted by the administrator extended over a period of only seven days. The petition herein was filed just seven days after the administrator was put in possession by plaintiffs. It does not appear that he shipped any ore, or if he did, that he did not ship it to Heinze himself, in pursuance of the understanding had at the time possession was delivered to him. The refusal of the application of the engineer on Feb-

ruary 3d is also insignificant and does not tend to show the truth of any statement contained in the petition, since it conclusively appears *aliunde* that Miller was not in the state, had never been in possession in person or by agent, and had never taken a pound of ore from the property; and since it also appears that Kleinschmidt was then out of the state, and that no one was at the mine, other than a watchman—ostensibly in the employ of Heinze or nobody—and whose only task was to keep watch of things and prevent the machinery from freezing up. True, it appears that the names of Sullivan and Mahoney, the watchmen, were not on plaintiff Heinze's pay roll after January 22d. It is a remarkable fact, however, that they remained there after Kleinschmidt went into possession, but were never hired by him, and looked to Heinze for their orders and their pay. The only conclusion possible from these facts is that the plaintiffs and the administrator joined hands to create a colorable ground for the appointment of a receiver through whom they could have the property mined, notwithstanding the injunction procured by Finlen to preserve it intact until he could establish his rights, and the proceeds expended in development work, which might or might not add to the value of it, or might or might not protect it from trespasses. And this in face of the fact that the plaintiffs, notwithstanding the injunction, were at liberty to bring as many suits as they chose to restrain these alleged trespasses. The plaintiffs well knew that though these suits were pending against them, they furnished no ground for asking a court of equity to take the property out of their hands and relieve them from the burden of caring for it; they well knew that in order to bring this about it was necessary to be in a position in which they could complain of wrong on the part of some one who claimed to be a co-tenant; and hence this suit upon a merely colorable ouster on the part of the administrator, who seems to have been not averse to aiding them in their design. So far as this feature of the case is concerned, there were no facts before the court to warrant the order. The court was misled to make it by the specious but unfounded and

unsupported complaints of the plaintiffs by which they sought to bring themselves within the principles which move a court of equity in such cases to grant the extraordinary relief demanded.

The administrator having gone into possession (if, indeed, he was in possession) by consent of the plaintiffs, with the understanding that he was at liberty to engage in mining, nothing short of a showing of a clear ouster and refusal to account, coupled with a want of financial ability to answer in a suit for this purpose, would probably justify a court in taking the property from his hands through the agency of a receiver. He was not imperiling the interests of the estate in any way. Whatever he did in his mining operations he did at his own risk (*In re Rose's Estate,* 80 Cal. 166, 22 Pac. 86); and that he was claiming to act as administrator in no wise affects the situation.

The allegations upon the subject of a probable fall in the price of copper pending the litigation do not merit serious consideration; they are hardly susceptible of proof. And it cannot be urged seriously that a court of equity should be moved to the exercise of its extraordinary powers by conclusions founded upon speculations upon the probable condition of supply and demand as to a particular commodity in the markets of the world.

Touching the outlay necessary to preserve the property while idle, a more serious question arises. The proof in this connection, however, is not satisfactory. On the one hand it appears that there is a hoisting plant with necessary machinery on the claim, and that it is necessary to keep watchmen to look after it and the claim, at a cost of about $500 per month. It also appears—incidentally, however—that the machinery probably belongs to the Montana Ore Purchasing Company, a corporation with which plaintiffs are associated. On January 23d the hoisting plant was delivered to the administrator under an arrangement with the plaintiff Heinze, the particulars of which are not shown. Whether its use there as a means of ingress and egress is necessary to the preservation of the openings in

the property, or whether these openings are in such a condition that they need care and attention, is not shown. If from their nature and condition they do not require attention and outlay, then the expenses incident to the employment of watchmen would under no circumstances be a proper charge upon the property. On the other hand, Finlen has not at any time attempted to interfere with the possession of the plaintiffs or the administrator, except to enforce his rights by suit; and there is nothing in the evidence to furnish any reason why either Heinze or the administrator, who seem to have joined forces against Finlen, should not retain possession and care for the property, with a right to recover of Finlen the amount expended for this purpose if they succeed in establishing their rights against him. Surely the plaintiffs have ample protection against any loss to them under the injunction bond given by Finlen in the ejectment suit. If this bond is not sufficient in amount, as plaintiffs charge, the district court, upon proper application, would readily exact a sufficient one.

That a court of equity has power in cases like the present to appoint a receiver is well settled. But in any case where an appointment is sought there must be shown a legal or equitable right, reasonably clear and free from doubt, attended with danger of loss. (Smith on Receiverships, Secs. 15, 317, and cases cited; High on Receivers, Secs. 606, 607.) The duties of a court, however, in the exercise of this power are exceedingly delicate and should be exercised with great caution, lest in the effort to protect the subject of the litigation the property would be illegally taken from one rightfully in possession and his rights and interests be sacrificed without any redress whatever. (*Id.*) Taking charge of property in the exercise of this power is somewhat analogous to the levying of an execution *in limine,* and subjecting the property to expenses and charges pending litigation, and to this extent consuming it entirely; hence the power should never be used unless it be reasonably clear that no injury will result to the parties whose rights are for the time being invaded. As between tenants in common, as stated in

the text of Mr. Smith, at Section 317, *supra*, the grounds of appointment usually are: "(a) Where one tenant is in possession and excludes his co-tenant from participation in the possession or income; (b) where the tenant in possession is insolvent and refuses to account to his co-tenant; (c) where one tenant refuses to join his co-tenant in the execution of necessary leases for the property owned in common, or interferes in the collection of rents with the tenants in possession; (d) where the court can see from the showing made that the appointment of a receiver is required in order to properly protect the interests of parties." The case at bar does not come within any of these rules; nor has any case been cited by counsel wherein a different rule has been applied. It seems that it would be entirely inequitable to allow plaintiffs to surrender the property here involved into the possession of the court merely because its care involves considerable expense.

Under the presumptions usually indulged in favor of the legal title, the plaintiffs, Finlen, and the Allport heirs, except Kelley, are, for the purposes of this appeal, tenants in common. Under Section 592 of the Code of Civil Procedure, fixing the status of such estates, and as construed with reference to mining claims in *Anaconda Copper Mining Co.* v. *Butte & Boston Mining Co.*, 17 Mont. 519, 43 Pac 924; *Red Mountain Consolidated Mining Co.* v. *Esler*, 18 Mont. 174, 44 Pac. 523; *Connole* v. *Boston & Montana C. C. and S. Mining Co.*, 20 Mont. 523, 52 Pac. 263; *Harrigan* v. *Lynch*, 21 Mont. 36, 52 Pac. 642; and *Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 25 Mont. 87, 63 Pac. 825,—each of these parties has the right to have the property stand as it is until it is finally partitioned. It would therefore require a much clearer showing than is here made to justify a court in invading this right, and mining the property through a receiver, for any purpose.

We feel impelled to call attention to the condition of the record filed on this appeal. It contains many pages of matter entirely impertinent and useless, which has served only to add

materially to the labor involved in this investigation. On the hearing in the trial court many court files were introduced in part, the particular part being designated. Instead of incorporating into the record on appeal only the material parts of these files, they were copied in full. Hereafter the party offending in this particular will be subject to the payment of costs.

The order appealed from is reversed and the cause is remanded.

Reversed and remanded.

MR. JUSTICE MILBURN, not having heard the argument, takes no part in this decision.

NOLAN, RESPONDENT, *v.* MONTANA CENTRAL RAILWAY CO., APPELLANT.

25 107
25 286

(No. 1,262.)

(Submitted February 8, 1901. Decided February 25, 1901.)

Railroads—Master and Servant—Injury to Servant—Appliances — Negligence — Evidence — Verdict—Direction—Appeal—Reversal—Directing Judgment on Remand.

1. An employe was struck and injured by a cable attached at one end to a locomotive, and at the other to a plow then being used to unload cars of dirt at a curve. The cable slipped over a wooden stake in a socket on the edge of a car on the outside of the curve, behind which it was placed by plaintiff's fellow servants to prevent the plow being pulled off the car on the inside of the curve. There was a groove in the socket holding the stake, in which the cable was usually placed when unloading dirt at a curve. There was no evidence that a block and tackle would have been safer thn the groove, which means was reasonably safe. *Held,* that the evidence did not support a verdict that the employe was injured by the employer's neglect to provide and use a block and tackle to guide such cable.
2. Where the trial court erred in denying a motion to direct a verdict for defendant, the court on appeal could not direct judgment for the defendant, since they could not know what exceptions, if any, were taken by the respondent to the trial court's rulings on the evidence offered.
3. The only exceptions properly included in a transcript on appeal are those of appellant.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Timothy Nolan against the Montana Central Railway Company. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Mr. A. J. Shores and *Mr. I. Parker Veazey*, for Appellant.

Messrs. Stanton & Lechey, Mr. Geo. Haldorn and *Messrs. Clayberg & Gunn*, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This is an appeal from the judgment and an order denying a motion for a new trial rendered and made by the district court of the Second judicial district, by which judgment the plaintiff recovers from the defendant for injuries alleged to have resulted from his being struck upon the head by a wire cable attached to a locomotive at one end and to a dirt plow at the other; said plow being used for scraping dirt from a train of flat cars which stood upon a curve on the railway track of the defendant. The plaintiff alleges in his complaint that the injury was caused by the defendant carelessly and negligently failing to provide and use a block and tackle at said curve to draw said plow or scraper along a certain car which was being unloaded, but instead thereof using a wire cable attached to the locomotive; the cable being held on the car by a wooden peg or pin, which being insufficient allowed the cable to slip over the top thereof, the cable striking the plaintiff, he then and there being near the car on the inner side of the curve assisting in the work of repairing the roadbed of the railway. The only negligence charged is as above stated.

The evidence in the case shows that plaintiff was struck by the cable; that at the time he was struck the cable, being attached to the said plow and locomotive, was thrown over a cer-

tain wooden stake, 4x4x18 inches, which was set in an iron socket or pocket on the outside of the curve on the edge of a certain flat car in front of the car on which the plow rested, it being necessary to hold the cable on that side of the train in order to prevent the plow from being pulled off from the side of the train on the inside of the curve; that the cable was so placed over the wooden stake by fellow servants of the plaintiff; that the cars of the defendant used on this occasion had all attached to them, on each side, iron pockets, in which wooden stakes of the said dimensions were placed; that each pocket was fastened to the car by an iron bolt or clasp, and that just below the bolt on each pocket was a groove, into which it was a practice to place the cable when unloading dirt on a curve; that the stake used as aforesaid was one of those above mentioned; that on the occasion referred to the cable slipped over the said stake and, going rapidly across the train to the inside of the curve, struck the plaintiff; that the cable could have easily been placed in two or more of the grooves, thereby rendering the operation of unloading dirt much safer; and that the wooden stakes were placed on each side of each car, about five feet apart, for the purpose of preventing the said plow or scraper from going over the side of the train.

The defendant assigns as error the court's denial of its motion for a nonsuit, and the court's refusal to instruct the jury to find for the defendant at the close of the evidence; and states as one of the grounds of motion for a new trial the insufficiency of the evidence to justify the verdict.

The employee who seeks to recover for injuries claimed to have been received through negligence for which his employer is liable must establish that negligence by proof.

It appears that the accident in this case was the result of the insufficiency of the means used by the plaintiff's fellow servants. We are of the opinion that the charge of negligence on the part of the defendant, in not furnishing a block and tackle, is not supported by the evidence. It does not appear that the

grooves were not sufficient and reasonably safe appliances. There was not any evidence tending to show that a block and tackle was a safer or more suitable appliance for the purpose of holding the cable than the grooves, which, upon the undisputed evidence, were reasonably safe means.

Whether, as to his servant, the master must, at his peril, provide the safer appliance, when it is known to him, is a question which is not here presented, and as to it we do not express any opinion.

A motion for a nonsuit was made after the plaintiff had rested, and said motion was denied. The defendant introduced proof and then moved the court to instruct the jury to return a verdict for the defendant, which motion was denied. The defendant assigns error in denying each motion and prays this court to reverse the court below and direct judgment for the defendant. The court below erred in denying the motions, respectively; but we cannot order judgment for the defendant, as we have no means of knowing what, if any, exceptions were taken by respondent in the court below to the rulings of the court on the evidence offered. The only exceptions properly included in a transcript on appeal are those of appellant. We have no means of anticipating what evidence, if any, the respondent may offer on a new trial. (*O'Rourke* v. *Schultz,* 23 Mont. 285, 58 Pac. 712; *Westheimer* v. *Goodkind,* 24 Mont. 90, 60 Pac. 817.)

The verdict is not supported by the evidence, in that there is no evidence to show that the defendant company was negligent, as claimed by respondent, in not furnishing a block and tackle.

The judgment and order denying a new trial are reversed and the cause is remanded.

Reversed and remanded.

HARRINGTON ET AL., APPELLANTS, v. SMITH ET AL., RESPONDENTS.

(No. 1,274.)

25 111
25 164
25 111
26 92

(Submitted February 28, 1901. Decided March 4, 1901.)

Appeal—Rules of the Supreme Court—Briefs.

Under Supreme Court Rule V, Subsection 3 (16 Montana 595), which was operative when appellants' brief was filed, an order appealed from will be affirmed when appellants' brief does not refer to any page number of the transcript, nor contain a specification of errors.

Appeal from District Court, Deer Lodge County; Theo. Brantly, Judge.

ACTION by Philip Harrington and others against Frank D. Smith and others. From an order granting a new trial after a verdict in their favor, plaintiffs appeal. Affirmed.

Messrs. Napton & Napton, for Appellants.

Messrs. Stapleton & Stapleton, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

The plaintiffs recovered a judgment against the defendants in the district court of Deer Lodge County. From an order granting a new trial the plaintiffs have appealed.

The order appealed from must be affirmed upon the ground that the brief of the appellants is not in compliance with the rules of this Court in force when it was filed. Subsection 3 of Rule V, which was operative when the brief in question was filed, provides that the brief shall contain, "in the order here stated: (1) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised, which abstract shall refer to the page numbers in the transcript in such manner that pleadings, evi-

dence, orders and judgments may be easily found. (2) A specification of errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. * * *" (16 Mont. 595.) The brief for the appellants does not refer to any page number of the transcript, nor is there a specification of errors. In conformity with the now settled and uniform practice of this Court the only disposition that can be made of the appeal is to affirm the order. We should affirm without a written opinion were it not that we desire again to call attention to the necessity of a substantial compliance with the rules of the Court prescribing the contents of briefs filed on behalf of appellants. A specification of the error or errors relied upon is an indispensable prerequisite to the considerations of appealed causes on their merits. (*Rehberg* v. *Greiser*, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41.)

The order granting a new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY, having tried the cause in the court below, does not participate in the foregoing decision.

STATE EX REL. STATE SAVINGS BANK, RELATOR, *v.* BARRET, STATE TREASURER, RESPONDENT.

25 112
26 28

(No. 1,644.)

25 112
39 100

(Submitted February 15, 1901. Decided March 4, 1901.)

Mandamus—Supreme Court — Original Jurisdiction—State Warrants — Assignment — Negotiability — Acceptance at Par—Interest — Constitutional Law—Contracts—Impairment of Obligation.

1. Where the state treasurer refused to pay interest on certain warrants drawn on the school of mines building fund, directed by statute to be paid therefrom, the mere fact that it was a state officer refusing to perform a ministerial duty was not a sufficient reason for invoking the original jurisdiction of the Supreme Court by an application for *mandamus*.

2. In the future, applications to the Supreme Court for writs of mandate must "set forth * * * the reasons which render it necessary that the writ should issue originally from this Court" (Rule II, Subdivision 2).
3. Where contractors were paid for state work by warrants drawn on a certain fund in the state treasury, and were entitled to interest thereon after presentation, the assignees of such contractors succeeded to all their rights, notwithstanding the warrants were non-negotiable, and were entitled to interest on the warrants.
4. Where contractors working for the state agreed to accept warrants on a certain fund at par, and in full payment for the work, such acceptance did not preclude their statutory right to interest on the warrants, but merely bound them to accept such warrants at their face value.
5. Under Constitution, Art. III, Sec. 11, the legislature can no more impair the obligation of a contract entered into by the state than it can the obligation of a contract made between individuals.
6. A statute which changes the terms of an agreement by imposing new conditions, or dispensing with those expressed or implied, is repugnant to the Constitution as being a law impairing the obligation of a contract; and the degree of impairment is immaterial.
7. Where a contract was made with reference to Political Code, Sec. 1601, which provided that, if certain state warrants to be issued in payment of work on the state school of mines building could not be paid on presentation for lack of money in the state school of mines building fund, out of which they were to be paid, they should bear interest at the rate of 7 per cent. per annum from the date of presentation, Laws of 1897, p. 124, repealing Political Code, Sec. 1601, was void as to such contract, being in conflict with Constitution of the United States, Art. I, Sec. 10, forbidding the impairment of the obligation of contracts by state legislation, and Constitution of Montana, Art. III, Sec. 2, to the same effect; hence the holder was entitled to interest on such warrants.

Mandamus by the State, on relation of the State Savings Bank, to compel the state treasurer to pay certain state warrants. Writ granted.

Messrs. McBride & McBride, for Relator.

Mr. James Donovan, Attorney General, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This is a proceeding in *mandamus* instituted by the State Savings Bank for the purpose of compelling the state treasurer to pay certain warrants addressed to him and drawn on the School of Mines Building Fund. An alternative writ was issued. To the petition the treasurer demurs for want of substance.

Eliminating its formal averments and condensing its statements the petition exhibits the following facts: By Section

17 of the so-called "Enabling Act," approved February 22, 1889, Congress granted to the state of Montana for the establishment and maintenance of a school of mines, 100,000 acres of land (25 Statutes at Large, 676; 1 Supp. Rev. St. U. S. pp. 645, 648). Thereafter, by Section 1 of "An Act to provide for the location, incorporation, establishment, maintenance, management and support of the Montana School of Mines," approved February 17, 1893, the Montana State School of Mines was established as a corporation. (Laws of 1893, p. 177; Section 1572 of the Political Code.) For the purpose of erecting, furnishing and equipping buildings for this corporation, the Legislative Assembly by an Act approved March 7, 1895, created the State School of Mines Commission, authorizing it to prepare plans and specifications for the erection of buildings, to advertise for bids for the construction thereof, and to let the contract to the lowest responsible bidder. (Sections 1591, 1594, 1595 of the Political Code.) The Act further created a state fund to be known as the "State School of Mines Building Fund," to the credit of which should go all moneys derived from the sale or rental of the lands granted by Congress to the state for the purpose of constructing buildings for the State School of Mines, and the moneys so received, as soon as realized from time to time, should forthwith be put into the state treasury and placed to the credit of the fund named. (Section 1600 of the Political Code.) That portion of the Act of March 7, 1895, which appears in the Political Code as Section 1601 is as follows: "Upon the completion of said building or buildings and at any time previous thereto as per the contract entered into by the board of school of mines commissioners they shall certify such amount or amounts to the state board of examiners, who shall forthwith cause to be drawn a warrant or warrants on the said state school of mines building fund to the order of the person or persons described by the board as entitled thereto, for the full amount of their respective claims, which said warrant or warrants shall be taken and accepted as in full payment of the said indebtedness, and no

appropriation for the payment of the said warrant or warrants shall ever be made or payment thereof ever be made by or from any other source than the said State School of Mines Building Fund, and if, on the presentation of said warrant or warrants to the state treasurer, there shall not be in said fund sufficient moneys to pay the same, the same shall be registered, as of date of presentation, and shall henceforth until paid bear interest at the rate of seven per cent. per annum." Another section of the Act of March 7th appears as Section 1597 of the Political Code: "All claims for the erection of said building or buildings shall be first approved by the school of mines commissioners and audited and allowed by the state board of examiners, and paid in the same mode and manner as claims against the state are paid: Provided, however, that such claims shall be paid out of the respective funds designated in this act, against which they may be chargeable."

On July 28, 1896, the commissioners entered into a contract with Riddle & Roach for the erection and construction at Butte of a building for the State School of Mines. Among other provisions, the contract contained the following: "It is hereby mutually agreed between the parties hereto, that the sum to be paid to the contractors for the said work and material, and for the entire erection and completion of the said building, as above provided, shall be eighty-eight thousand four hundred fifty-six and eighty-five one hundredths ($88,456.85) dollars, subject to additions and deductions on account of alterations, as hereinbefore specified, and that said sum shall be paid in warrants on the State School of Mines Building Fund, which shall be drawn as provided in Section 1601 of the Political Code of Montana, upon certificates of the Board to the State Board of Examiners, and which warrants the contractors agree to accept at par in full payment and satisfaction of this contract." Pursuant to the contract, and in accordance with its terms, Riddle & Roach completed the building, which was approved and accepted by the commissioners and is now used and occupied by

the School of Mines. At the time the contract was made, and at the time Riddle & Roach entered upon its performance, all of the sections mentioned were in force. After Riddle & Roach had in large measure performed the contract, by an Act entitled "An Act authorizing the issuance of bonds to provide for the payment of outstanding warrants and for the erection and completion of a building for the School of Mines at the city of Butte and providing for the payment of interest thereon, and repealing of Sections 1584, 1600 and 1601 of the Political Code of Montana," approved March 8, 1897, provision was made for a fund for payment of the cost of erection of the School of Mines building then in process of construction by Riddle & Roach. (Laws of 1897, p. 124.) This Act abolished the School of Mines Building Fund, and in its stead created the School of Mines Building, Interest, and Sinking Fund, and, in effect, required that all moneys which had theretofore been payable into the first-named fund should be paid into the latter-named fund, and that warrants drawn by the State School of Mines Commission should be paid out of the new fund. The Act purported to repeal Sections 1584, 1600 and 1601. In part payment of the erection of the building the commissioners, in conformity with the contract and under the authority of Section 1601, from time to time caused to be delivered to Riddle & Roach the warrants which are the basis of the present proceeding. When the warrants were delivered there was no money in the fund upon which they had been drawn, and the state treasurer thereupon registered them in accordance with the provisions of Section 1601. The warrants were all registered between May 23, 1897, and September 6, 1899. The warrants were then assigned to the plaintiff (relator), which has presented them for payment. Although at the time of presentation there was and still is sufficient money in the School of Mines Building, Interest, and Sinking Fund to pay all the warrants, both principal and interest, the treasurer refused, and continues to refuse, to pay any interest thereon, and demands the surrender of the

warrants upon the payment of the principal amounts only. The ultimate question presented for decision is, whether the warrants registered since the Act of March 8, 1897, became operative bear interest from the date when they were registered.

1. The mere fact that a state officer refuses to perform a ministerial duty specially imposed upon him furnishes no reason why this Court, in the exercise of its original jurisdiction, should grant a writ of mandate. District courts are ordinarily the primary forums, and in them should be commenced special proceedings unless sufficient reasons exist why resort to the Supreme Court is necessary in the first instance. The sole ground upon which the plaintiff has invoked the original jurisdiction of this Court is that the defendant is the state treasurer. The proceeding should have been commenced in the district court. In view, however, of the loose practice which in this respect has occasionally been indulged, we permitted the alternative writ to be issued and shall retain jurisdiction of the case; but in the future applications for writs of mandate must, in the language of Subdivision 2 of Rule II of this Court "set forth * * * the reasons which render it necessary that the writ should issue originally from this Court;" and that the duty, the performance of which is sought to be enforced rests upon a state officer, board, or tribunal, will not be deemed a sufficient reason for invoking the original jurisdiction of the Supreme Court.

2. The first objection urged by the attorney general in behalf of the state treasurer is that "there is no privity of interest existing between the owners of the warrants and the original contract between the state and the contractors, that even though the contractors were entitled to interest, the mere ownership of the warrants by the relator would not subrogate them to the rights under the contract, but it would put the relator in the position of having purchased these warrants, which are non-negotiable instruments, and a thing that bears no relation to the contract in any way. It is merely an order upon the state

to pay out of a particular fund such money as the law authorizes to be paid out of the fund when the warrant is presented."

In answer to this position it is sufficient to say that the plaintiff as assignee of the warrants succeeded to and is clothed with all the rights which Riddle & Roach, the assignors, would possess were they yet the owners. That the warrants lack the quality of negotiability essential to constitute commercial paper neither adds to nor detracts from the rights of the plaintiff. If Riddle & Roach would be entitled to collect interest on the registered warrants, the plaintiff is likewise so entitled.

3. Further objection to allowance of interest is urged upon the ground that Riddle & Roach agreed to accept the warrants at par and in full payment and satisfaction of the contract. The purpose of this part of the contract is obvious and its effect manifest. The warrants were to be accepted at their face values,—neither at a premium nor at a discount. Each warrant at its par value was to be accepted as a payment on the contract price; this was the purpose. The delivery of each warrant operated as payment to an amount equal to its face value and thereby satisfied *pro tanto* the conditions of the contract; this was the effect. In illustration: A warrant for $1,000, whether actually worth more or less, was, upon delivery to Riddle & Roach, payment of $1,000 of the contract price, and to that extent was in satisfaction of the contract.

4. The final attack upon the petition consists in the suggestion that the payment of interest on the warrants after registration was not within the contemplation of the parties when the contract was made, and that therefore the repeal of Sections 1600 and 1601 of the Act of March 8, 1897, is applicable to warrants thereafter drawn and annuls the provision of Section 1601 which prescribed that warrants should bear interest at the rate of 7 per cent. per annum from registration until paid. The plaintiff, on the contrary, insists that the repeal of the provision allowing interest on registered warrants can have no effect upon its right to collect interest, for the reason that

the repeal of the provision mentioned was an attempt to impair the obligation of the contract entered into between the state and Riddle & Roach, and hence, that the Act, in so far as it purports to abrogate the provision touching interest, is void.

That which binds a party to the fulfillment of his agreement is the obligation of a contract. It consists of the duty which the law imposes upon the parties to perform their agreements. (See 15 Am. & Eng. Enc. Law (2d Ed.) 1040, and cases cited.) The duty which the law casts upon a party to comply with the terms of the contract which he has promised to perform, is therefore the obligation of his contract. Impairment of this obligation by state legislation is prohibited. (Section 10, Article I of the Federal Constitution; Section 11 of Article III of the Constitution of Montana.) When a state enters into a contract such as the one it made with Riddle & Roach it is not acting in its governmental or sovereign capacity but comes down to the level of persons; its contract has the same meaning as that of similar contracts between subjects, and therefore the law imposes upon it the obligation to perform its agreement according to the terms thereof. (*Murray* v. *City of Charleston,* 96 U. S. 443, 24 L. Ed. 760.) The legislative assembly can no more impair the obligation of such a contract than it can the obligation of a contract made between individual persons. While a change in the form of obtaining redress may be made, provided a substantial remedy is given or remains, the obligation of a contract depends nevertheless upon its terms, and the means which the law in existence at the time it was entered into afforded for its enforcement. A statute which changes the terms of an agreement by imposing new conditions, or dispensing with those expressed or implied is a law which impairs the obligation of a contract, for such a law "relieves the parties from the moral obligation of performing the original stipulations of the contract and prevents their legal enforcement." (*Railroad Co.* v. *Pennsylvania, sub nomine "Case of the State Tax on Foreign-Held Bonds,"* 15 Wall. 300, 21 L. Ed. 179.) The

degree of impairment is immaterial; a law lessening or increasing the obligation, or dispensing in even the slightest degree with its force, is repugnant to the fundamental law of the land. If at the time the contract was made the parties agreed in express terms, or by implication, that the warrants should bear interest after registration, a statute subsequently passed purporting to repeal the law under which interest was allowed and in reference to which the contract was made would, if enforced, dispense with a condition, and thereby impair the obligation, of the contract.

When the contract was made Section 1601, *supra,* was in force. This section provided that the warrants should be taken and accepted in full payment of the indebtedness to be incurred for the construction of the building, that no appropriation for the payment of the warrants should ever be made, or payment ever be made by or from any other source than the State School of Mines Building Fund; and, the legislative assembly contemplating that there might not be in the State School of Mines Building Fund sufficient money to meet the warrants drawn from time to time in payment of the contract price, it was further provided that if on the presentation of such warrants to the state treasurer there should not be enough money in the fund to pay them, they would be registered as of the date of presentation and were thenceforth, until paid, to bear interest at the rate of 7 per cent. per annum. It was also contemplated by the parties themselves that payment of the warrants might be delayed or postponed beyond the time when they were presented, and that in such event Riddle & Roach should have the right to cause their registration and be entitled thenceforth to interest as provided in Section 1601. One of the conditions of the contract was that the state would pay the face of the warrants upon presentation to the treasurer whenever sufficient money should be in the State School of Mines Building Fund for that purpose, and the state further promised that if at any time there should not be enough money in the fund to pay the

warrants they should be registered as of the date of presentation and thereafter bear interest. This agreement explicitly set forth in Section 1601 and referred to by the contract, was part and parcel of the consideration moving from the state through its duly authorized agents to Riddle & Roach. The right to collect interest on the registered warrants is, under the facts shown to exist in the case at bar, as clear as is the right to receive the principal sums. The promise to pay the interest out of the money in the building fund after registration was a condition the performance of which the law imposed upon the state as a duty; and the performance of this duty devolved upon the defendant state treasurer. The impairment of this obligation is as much beyond the power of the legislature to accomplish as is the impairment of the obligation to pay out of the proper fund the amounts for which the warrants were drawn. The statute which authorized the contract to be made and which was in force at the time it was made, conferred upon Riddle & Roach the right to receive interest on the warrants from the date of registration, and the contract was entered into in contemplation of and with reference to the statute. The state when it contracts as a person has no reserved right to withdraw or destroy by legislative action the effect of its promise which at the time it was made was founded upon a valuable consideration.

The demurrer is overruled. The defendant declines to plead further; upon the filing of the proper *praecipe* therefor, judgment will be entered awarding a peremptory writ of mandate as prayed.

Writ granted.

HAUPT, APPELLANT, v. INDEPENDENT TELEGRAPH MESSENGER CO., ET AL., RESPONDENTS.

(No. 1,257.)

(Submitted February 6, 1901. Decided March 4, 1901.)

Injunction—Irreparable Injury — Pleading — Complaint — Amendment—Discretion.

1. Where, on the trial of an action to restrain defendants from destroying plaintiff's telegraph wires and poles, there is no allegation in the complaint that defendants were threatening to do any injury to the plaintiff, or that he feared or believed there was an existing danger, or that defendants were insolvent, defendants' objection to any evidence, on the ground that the complaint fails to state any cause of action against them, should be sustained.
2. There are, at least, three rules to be observed in framing a bill in equity: (1) To state the plaintiff's rights in the subject matter; (2) to set up the acts which the defendant is doing or is threatening to do against such rights; and (3) to give a distinct statement, in ordinary and concise language, of such facts as show to the court that the injury will be irreparable.
3. Where, in an action to restrain defendants from destroying plaintiff's telegraph wires and poles, the proposed amended complaint does not show that plaintiff has poles and wires of any material value, or sufficient for business, it is not an abuse of discretion for the court to refuse to permit such amended complaint to be filed, since such complaint does not show that plaintiff may be irreparably injured, and hence does not state a cause of action for injunction.
4. It is not abuse of discretion to refuse leave to file an amended complaint which does not state a cause of action, or which would be open to a demurrer and to a motion to make more definite and certain.
5. By "discretion" is meant sound discretion, guided by law.

MR. JUSTICE PIGOTT concurring in the judgment of affirmance upon the ground that the averments of the complaint and of the amended complaint with respect to the property do not show that the threatened injury thereto will work irreparable damage, but dissenting in respect of the intimation that the amended complaint is open to a motion to make it more certain, as well as to a demurrer for want of substance.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Henry S. Haupt against the Independent Telegraph Messenger Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Mr. Oliver M. Hall, for Appellant.

The original complaint states a cause of action for an injunction. It shows that defendants are threatening and are about to commit acts which, by the destruction of plaintiff's property, would result in the destruction of his business and would render plaintiff's franchise granted by the city of Butte worthless. Such acts on the part of defendants amount to a nuisance and should be restrained by a court of equity. (*Arthur* v. *Oaks,* 63 Fed. 310; *Emmack* v. *Kane,* 34 Fed. 46; *Casey* v. *Cincinnati Typographical Union,* 45 Fed. 143; *Blindell* v. *Hogan,* 54 Fed. 40; *Elder et al.* v. *Whitesides et al.,* 72 Fed. 724; *Sherry* v. *Perkins,* 147 Mass. 212; *Boston Water Power Co.* v. *Boston & W. R. R. Co.,* 16 Pick. 512; *B. & L. R. R. Co.* v. *S. L. R. R. Co. et al.,* 2 Gray (Mass.) 1; *Camden Horse Ry. Co.* v. *Citizens' Coach Co.,* 31 N. J. Eq. 525.)

It is immaterial that no overt act has been committed to injure plaintiff. The threats and the allegations that they will be executed is sufficient to give the court jurisdiction. (*Elder et al.* v. *Whitesides,* 72 Fed. p. 726; *Arthur* v. *Oaks,* 63 Fed. p. 316.) The fact that the acts complained of are criminal is immaterial. (72 Fed. p. 725; 63 Fed. 310.) It has been repeatedly decided that interference with the franchise and business of a ferry by persons having no right so to do will be enjoined as a nuisance. (*Midland T. & Ferry Co.* v. *Wilson,* and cases cited in notes to same, 28 N. J. Eq. 537.) The proposed amended complaint states a cause of action, and the court should have allowed the same to be filed. (See cases cited, *supra.*)

The position taken by counsel and by the lower court was that the acts complained of amounted only to a trespass and that equity would not interfere to enjoin a trespass. Assuming that the acts complained of by plaintiff amount to a mere trespass, equity will enjoin a trespass:

1. When the trespass is continuing, and where it is necessary to avoid a multiplicity of suits.

2. When it would be impossible or difficult to estimate the damages.

3. When the defendants are insolvent.

All of the above named conditions exist in this case. (*Lee* v. *Watson,* 15 Mont. 228; *Palmer* v. *Israel,* 13 Mont. 209; *Elder et al.* v. *Whitesides et al.,* 72 Fed. 724; *Sankey* v. *St. Mary's Academy,* 8 Mont. 265; *Blindell* v. *Hogan,* 54 Fed. 40.)

MR. JUSTICE MILBURN delivered the opinion of the Court.

This is an action wherein the plaintiff appeals from the judgment against him dissolving a restraining order and for costs. The complaint was filed February 15, 1896, praying for injunction to enjoin defendants from injuring and destroying certain poles, wires and appliances said to belong to plaintiff, and from in any wise hindering plaintiff in the operation of a certain alleged messenger system, pursuant to the terms of a franchise granted by the city of Butte. It is alleged in the complaint that the city of Butte, by its ordinance numbered 364, granted to the predecessors of plaintiff certain franchises and privileges, to-wit, to string wires over and across the buildings on Main street, from Copper to Mercury, and from Arizona to Montana, and to cross said streets in the city of Butte, without erecting any poles or posts on said streets, for the purpose of constructing "a parcel delivery and telegraph call system" within said city, and to erect and maintain poles and wires, with necessary arms and braces, on such other streets and alleys as may be necessary to carry on said business; that the plaintiff and his predecessors have at all times faithfully complied with all conditions imposed by the ordinance, and with all ordinances and regulations relating thereto, adopted by the city council and its officers; that, pursuant to the terms of said franchise, plaintiff "has constructed and erected within the city of Butte, wires and poles and appliances for a district messenger service, and is now about to operate the same in accordance with the terms of said franchise;" that, "since the completion of the work of constructing said appliances for the

operation of said messenger service, the defendants, and all of them, have threatened to this plaintiff that, if he attempts to operate said messenger system in accordance with the terms of said franchise, they will, by force, destroy said appliances and poles, and cut said wires, and by force render said messenger system inoperative;" that such acts will delay and obstruct plaintiff in the operation of said system, and render said system and the said franchise valueless to plaintiff; and that damages cannot be compensated in an action at law. Defendants answered, and plaintiff replied. Upon the trial, November 24, 1897, the defendants objected to the introduction of any proof by the plaintiff, upon the ground that the complaint did not state a cause of action against them, or any of them; which objection was sustained, the plaintiff excepting. Thereafter, and before the jury was excused, the plaintiff, in writing, moved the court for leave to amend his complaint. The court discharged the jury and set the motion to be heard on November 27, 1897. The hearing was continued by consent. On December 1, 1897, a proposed amended complaint, embodying the matter contained in said motion, was served on defendants, and was duly presented to the court, together with said motion. The amended complaint sets out the said ordinance in full and repeats, substantially, the allegations of the original complaint, except in the amended complaint it is averred that the poles, wires and appliances are "for a district service," and, as to the threats, it declares that, "since the completion of the work of constructing said appliances for the operation of said messenger service, the defendants, and all of them, have threatened this plaintiff that, if he attempts to operate said messenger system in accordance with the terms of said franchise, they will, by force, destroy said appliances and render said messenger system inoperative, and, if not restrained by the order of this Court, defendants will carry said threats into execution;" it further states "that the poles, wires and appliances which the defendants threaten to destroy are absolutely necessary and indispensable to the carrying on of the said busi-

ness, and, if the same are injured or destroyed, said business cannot be carried on while the said wires are being replaced." It is averred also that the loss of income cannot be told, for the reason that it is impossible to know in advance the patronage which may be secured; and that the defendant companies are insolvent. The motion to amend by filing the amended complaint was denied. Appellant assigns error in sustaining the objection to the introduction of evidence and in denying the motion to amend.

The original complaint did not state facts sufficient to constitute a cause of action. There is nothing in it to show that, at the time of commencing the action, the defendants, or any of them, were threatening to do any injury to the plaintiff, or that plaintiff at that time feared or believed that there was then existing danger; there is not any allegation of insolvency of any of defendants; there is nothing to show that great or irreparable injury will result from the execution of threats. Some of these points will be considered later in this opinion.

The objection to the evidence was properly sustained. The important question in this case is this: Did the court below abuse its discretion in refusing leave to file the amended complaint?

No appearance was made by respondent in this Court. The transcript, the brief and the argument of appellant's counsel all fail to point out on what particular ground the court refused leave to file. We therefore are forced to make a critical examination of the amended complaint, and, considering what judicial discretion is, to determine, without aid of counsel, whether or not the court abused its discretion.

It is not possible to give a general outline of a bill in equity that would be applicable in all cases, or even in a majority of them. There are, at least, three rules to be observed, however: (1) To state the plaintiff's rights in the subject-matter; (2) to set up the acts which the defendant is doing or is threatening to do against such rights; and (3) to give a distinct state-

ment, in ordinary and concise language, of such facts as show to the Court that the injury will be irreparable.

We first seek for a distinct statement of facts which show that the injury will be irreparable. There is nothing alleged to show that the plaintiff has put himself in a position to do any business or to earn any income, or that he has expended more than a trifling sum, or that he has sufficient facilities, apparatus, appliances or other means to carry out the purposes of the franchise. There is not a single allegation showing, or tending to show, that plaintiff has hired or engaged the services of operators, procured offices, or put up any considerable number of poles or wires or other appliances. The only allegation is that plaintiff "has constructed and erected within the city of Butte wires and poles and appliances for a district service." The most liberal construction of this language cannot make it to mean that he has put up poles, wires and other appliances suitable and sufficient in number for the operation of a business so considerable that destruction of the same will result in irreparable injury. Possibly there have been put up no more than two poles and two wires, each one 100 feet long, with a telephone at each end thereof. The opinion of the complainant as to what will be irreparable injury is immaterial. The important question is, can the chancellor believe from the statement of facts that irreparable injury will result, judging from the statement of facts? Reading the ordinance, we find that authority is given to string wires over houses in certain streets of the city, and to put up poles and wires on such other streets and alleys as may be necessary for the business, and as may be determined by the city engineer. How large a territory has actually been covered might well have been alleged, but is not stated. So here, again, the Court has no means of knowing a fact upon which, with other things, if known, but not stated, it might base a conclusion that the business, if started, would be remunerative, and therefore irreparable injury would result from a destruction from the appliances now said to be ready for use. There being in this case no present income to be lost, the future

income being merely speculative, the pleader should to a reasonable extent show to the Court what work he has done and what money he has invested,—that is, what his earning capacity is,—so that the Court can reasonably infer whether or not the injury will be irreparable.

The allegation in the amended complaint, therefore, as to the erection of the poles, wires and appliances, is so indefinite and uncertain as, in our opinion, to be insufficient, since it fails to show that plaintiff has any property of such value that its destruction would result in irreparable injury.

We are of the opinion that the amended complaint does not state facts sufficient to constitute a cause of action, in that it does not show to the court facts from which a conclusion should be drawn that the plaintiff has established or set up any system or enterprise, interference with which would result to him in irreparable injury. We notice that all references in the amended complaint to the kind of business to be entered upon are conflicting, vague and uncertain; they do not, in apt and suitable terms, describe the business contemplated by the city council. The ordinance authorizes the establishment of "a parcel delivery and telegraph call system," but plaintiff in his amended complaint denominates his supposed enterprise as "a district service," "messenger service," "messenger system," "district messenger and parcel delivery system," and in the prayer for injunction asks protection for his "messenger system," but does not, in a single instance or in any way, refer to it as a "parcel delivery and telegraph call system." The amended complaint was open to demurrer and to a motion to make more definite and certain. The court was not, by any rule or principle, bound to permit such a pleading to be filed. It is not abuse, but good use, of discretion to say to the plaintiff in such a case: "Your complaint is insufficient and wanting in that definiteness, perspicuity and certainty necessary to show that you are about to suffer irreparable injury, and, in my discretion, I refuse leave to file it." It is not abuse of discretion to refuse leave to file an amended complaint which does not state a cause of action,

or which would be open to a motion to make more definite and certain. (*Smith* v. *Gould,* 61 Wis. 31, 20 N. W. 369; Boone on Code Pleading, Sec. 239; *Shipman* v. *State,* 43 Wis. 381.)

By "discretion" is meant sound discretion, guided by law. It must not be controlled by humor, whim or caprice; but by the judgment and conscience of the judge, and not by the judgment or conscience of others. It must be used in deciding what is just and proper under the circumstances. It cannot be governed by any fixed principles or rules. The establishment of a clearly-defined rule would be the end of discretion. (9 Am. & Eng. Enc. Law, p. 473, and notes; *Howell* v. *Mills,* 53 N. Y. 332; *Norris* v. *Clinkscales,* 47 S. C. 488, 25 S. E. 797; *Jensen* v. *Barbour,* 12 Mont. 576, 31 Pac. 592.)

As the judgment must be affirmed for the reasons stated, we do not express any opinion as to the sufficiency of the allegations of the amended complaint as to threats.

Affirmed

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE PIGOTT: I concur in the judgment of affirmance, but do not agree to all that is said in the foregoing opinion. The amended complaint which was offered is deficient in its allegation touching the extent, amount, and value of the property the destruction of which was threatened by the defendants; there is not enough stated to show that the threats, if executed, would cause irreparable damage. The court did not abuse its discretion in refusing to permit the proposed amended complaint to be filed, for it does not state facts sufficient to constitute a cause of action at law,—or, rather, it does not contain allegations which, if proved, would entitle the plaintiff to a legal remedy,—nor set forth matter sufficient in equity to require the interposition of the extraordinary remedy of injunction. My concurrence is upon the ground that the averments of the complaint and of the amended complaint with respect to the property do not show that the threatened injury

thereto will work irreparable damage. Upon the other questions so clearly stated and ably discussed by Mr. Justice Milburn, I express no opinion, except in respect of the intimation that the amended complaint is open to a motion to make it certain, or more certain, as well as to a demurrer for want of substance. That it was obnoxious to a demurrer I am satisfied; but I am inclined to the view that, since Subdivision 7 of Section 680 of the Code of Civil Procedure provides for a demurrer on the ground that the complaint is ambiguous, unintelligible, or uncertain, a moton should not be entertained to make a complaint more certain. Where a demurrer lies for uncertainty, a motion ought not to be allowed for the same fault, unless the motion be considered as a demurrer; if so considered, it should be filed within the time that a demurrer for uncertainty might be filed. The statute has prescribed attack by demurrer as the appropriate method of reaching the vice of uncertainty, and therefore a motion, as such, is not a remedy. Perhaps a motion may lie to make a complaint more definite; but for every fault mentioned in Section 680 which appears upon its face, demurrer seems to be the sole remedy, except where there is want of substance or lack of jurisdiction. This view is supported, it seems to me, by Section 685 of the Code of Civil Procedure: "If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1901.

PRESENT:

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM T. PIGOTT,
THE HON. GEORGE R. MILBURN, } Associate Justices.

IN RE WELLCOME.

(No. 1,401.)

(Submitted March 6, 1901. Decided March 8, 1901.)

Disbarred Attorney—Reinstatement.

The mere petition of attorneys and others for the reinstatement of a disbarred attorney will not be considered, such attorney not being before the Court in person or by petition by him subscribed, asking for reinstatement, and giving his reasons therefor.

PETITIONS of W. Y. Pemberton and William Scallon, Esqs., and Walter Cooper et al. for the reinstatement of John B. Wellcome as a member of the bar of the Supreme Court of the State of Montana.

ORDER PER CURIAM.

Under no practice known to this Court, or to any other court, so far as this Court is advised, can the mere petitions of attorneys and others for the reinstatement of a disbarred attorney be considered.

Said John B. Wellcome not being before this Court in person, or by his petition by him subscribed, asking for reinstatement, and giving his reasons therefor, there is nothing which this Court can entertain; and therefore it is ordered:

That said petitions of said attorneys and others be not considered.

Mr. Justice Pigott is of the further opinion that the petitions or memorials are frivolous, state no reason why said Wellcome should be admitted to the bar, have no place among the papers or records of this Court, and should, therefore, be stricken from the files.

JONES, RESPONDENT, *v.* GIESKE ET AL., APPELLANTS.

(No. 1,265.)

(Submitted February 26, 1901. Decided March 11, 1901.)

Contracts—Specific Performance—Dower Interest of Wife.

Where it is sought to compel specific performance of a contract to convey, and it appears that defendant's wife did not join in said contract, the decree for specific performance will require a conveyance by said defendant reserving to his wife whatever right of dower she may have in the land.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Alfred E. Jones against John E. Gieske and others. Judgment for plaintiff. Defendants appeal. Modified.

Mr. Sam Stephenson and *Mr. James W. Freeman*, for Appellants.

Mr. William G. Downing, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This is an appeal from an order denying a motion for a new trial and from the judgment.

The suit was brought to cancel a deed made by one Millard and wife to one Mary E. Gieske, and to compel one John B. Gieske to convey to plaintiff by deed certain real estate. It is claimed that Millard and wife made and delivered to plaintiff a deed for lot 3 in block 10 of the townsite of Belt, Cascade county, Montana, which deed was never recorded; that defendant John B. Gieske agreed in writing to convey to plaintiff lot 28 in block 11 of said townsite upon the payment of a certain sum, and that plaintiff paid all of said sum except $225, and was ready and willing to pay said balance as per the terms of the agreement; that Gieske fraudulently induced plaintiff to deliver said unrecorded deed for said lot 3 to him (Gieske), who delivered it to Millard, and that Millard and wife thereupon made and delivered to defendant Mary E. Gieske a deed for lot 3, and the deed was recorded; that said John B. Gieske fraudulently induced plaintiff to cancel said contract for lot 28, and to accept in consideration of the surrender of said contract a deed for a certain lot 1 in block 1, Riverside addition, St. Paul, Minnesota, together with a promissory note of defendant John B. Gieske for $250. It is charged that the property surrendered by plaintiff was valuable, and that the St. Paul lot was of little value, and the note worthless.

The court below, sitting with a jury, found for plaintiff, and

decreed: (1) that the $250 note be canceled; (2) that the plaintiff reconvey to John B. Gieske said lot in St. Paul; (3) that plaintiff pay to John B. Gieske $17.51, the balance of the $225 due on account of lot 28, deducting the amount adjudged to plaintiff for rents and costs; (4) that defendants convey to plaintiff, by deed, said lots 3 and 28; (5) that possession of said lots 3 and 28 be restored to plaintiff upon payment of said sum of $17.51; (6) that defendants be devested of all title to said lots 3 and 28, and that the title thereto be vested in plaintiff; (7) that plaintiff have $150, the rents collected, and (8) for costs.

The appellant relies, in his brief, upon alleged insufficiency of the evidence, and upon certain alleged particulars in which the judgment is against the law. We have carefully examined the evidence, and find that it is not insufficient to support the material findings as made and adopted by the court. We do not find that the court erred in its rulings on the evidence. The court did not err in denying the motion for a new trial.

In the light of the pleadings and the evidence the judgment must, however, be modified as follows: Whereas said judgment orders that the said defendants convey to the plaintiff, by deed, said lots 3 and 28, let it be ordered by said district court that said deed from Millard and wife to Mary E. Gieske for said lot 3 be canceled, and declared void, and that Millard at once return and deliver to plaintiff the deed for said lot 3 heretofore by him and his wife executed and delivered to plaintiff; and whereas, the parties hereto have admitted that Mary E. Gieske was the wife of defendant John B. Gieske at the time said contract for the sale of lot 28 was entered into by plaintiff and John B. Gieske, and it appears that Mary E. Gieske did not join in said contract, it is ordered that the said judgment be further modified to the effect that John B. Gieske, without said Mary E. Gieske, be ordered to convey, by proper deed, to plaintiff, said lot 28, within five days after tender of the said balance of $17.51, due by plaintiff; and that said decree be further modified to reserve to Mary E. Gieske whatever right of dower she may have, if any, in said lot 28.

The order of the court denying the motion for a new trial is affirmed, and the judgment of the said court is affirmed as modified. Respondent will recover his costs in this Court, except as against Mary E. Gieske, to whom he will pay such costs as she has incurred upon appeal.

Affirmed and modified.

WETZSTEIN, RESPONDENT, *v.* BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO., APPELLANT.

25	135
125	257
25	135
d26	44
25	185
e28	87
28	88

(No. 1,658.)

(Submitted March 1, 1901. Decided March 11, 1901.)

Injunction—Restraining Order—Appeal—Supersedeas—Stare Decisis—Order to Show Cause—Time for Hearing—Reasonableness—Abuse of Discretion.

1. Code of Civil Procedure, Sec. 1722, as amended February 28, 1899, provides that an appeal may be taken from an order granting or dissolving an injunction or refusing to grant or dissolve an injunction. *Held,* that the Supreme Court has no jurisdiction to grant an order of *supersedeas* to stay a temporary restraining order pending the hearing of an order to show cause why an injunction should not be issued, as there is no appeal from a temporary restraining order. (MR. JUSTICE PIGOTT dissenting.)
2. In matters of practice the rule of *stare decisis* does not control, as it is proper to establish a correct and legal practice, if error has been committed in a former opinion of the court, provided it is apparent that no substantial injury will be suffered by litigants by reason of reliance upon the precedent.
3. Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company, and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause six weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period.
4. It is only in exceptional cases that a restraining order should issue without requiring a bond.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Adolph Wetzstein against the Boston & Montana Consolidated Copper & Silver Mining Company. Order restraining defendant, and it appeals, and petitions for an order of *supersedeas.* Petition denied.

Messrs. Forbis & Evans, for Appellant.

Messrs. McHatton & Cotter and *Mr. J. M. Denny,* for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This cause comes now before this Court upon the petition of the defendant for an order of *supersedeas* staying a certain restraining order issued by the district court on February 18, 1901, pending a hearing of an order to show cause, on April 2, 1901, why a temporary injunction may not issue enjoining the defendant from continuing certain work in and about the Comanche lode claim. On the 25th day of February, 1901, the defendant appealed from the order so restraining the defendant pending the hearing on the order to show cause why a temporary injunction should not issue.

Respondent contends that this Court has no jurisdiction to grant the petition, for the reason that there is no appeal to this Court from a restraining order. We are of the opinion that respondent is right in the position he takes. Section 873 of the Code of Civil Procedure very clearly makes a distinction between an injunction and a restraining order. A restraining order is distinguishable from an injunction, in that a restraining order is intended only as a restraint upon the defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination. Such an order is limited in its operation, and extends only to such reasonable time as may be necessary to have a hearing on an order to show cause why an injunction should not issue. (10 Enc. Pl. &

Prac. 878; *College Corner, etc., Road Co.* v. *Mess*, 77 Ind. 139; *Hicks* v. *Michael*, 15 Cal. 107; *San Diego Water Co.* v. *Pacific Coast S. S. Co.*, 101 Cal. 216, 35 Pac. 651; *Fenwick Hall Co.* v. *Town of Old Saybrook* (C. C.) 66 Fed. 389; *Strickland* v. *Griffin*, 70 Ga. 541.)

It is the plain duty of a court to set the order to show cause at a very early day, and, upon the application of the defendant, to shorten the time, to the end that, if the facts on the hearing warrant it, the restraining order may be discharged. In such a case, appeal from a restraining order is not possible or contemplated, for the reason that on the hearing, or soon thereafter, the court, in the discharge of its duty, will grant or refuse an injunction, and in either event the restraining order is dead. The law presumes that a judge will be fair and just, and will not put off the hearing of the order to show cause until a day so distant that by the force of his own despotic will a mere temporary expedient, to-wit, a restraining order, granted *ex parte* and without bond, perhaps, will become an injunction. A judge might, over the objection of the plaintiff, set a demurrer to a complaint for hearing at a time one year ahead. This might work great injury to the plaintiff, but the remedy of the injured plaintiff could not be by appeal from the order so setting the hearer on demurrer. We are aware that in *Bennett Bros. Co.* v. *Congdon*, 20 Mont. 208, 50 Pac. 556, the court decided that a restraining order was an order from which an appeal might be taken, and that in *Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 24 Mont. 125, 60 Pac. 1039, the court considered such an appeal; but the point in the latter case, considered on appeal, was simply whether or not the complaint was properly verified. The rule of *stare decisis* does not here control, as it is not unusual, but proper, in matters of practice, to establish a correct and legal practice, if an error has been committed ill-advisedly in a former opinion of this court, provided that it is apparent that no substantial injury will be suffered by litigants by reason of reliance upon the precedent. The Court does not in *Bennett*

Bros. Co. v. *Congdon, supra,* give any authority for its holding. It does not appear in that case that it acted upon anything more urgent than a suggestion of counsel, or that there was an argument upon, or serious consideration of the point; and, further, it appears from an examination of the case that the "temporary restraining order" was in fact an injunction *pendente lite*, and not a mere restraining order pending a hearing upon an order to show cause why an injunction *pendente lite* should not issue as in the case at bar.

This Court does not deem it improper to say that in reviewing this case it notices an abuse of the power of the court below in setting the order to show cause over so long a period of time. In the exercise of its extraordinary powers in cases, such as the one at bar, involving important interests and mining operations, which may suffer from interruption and delay, the court should grant a hearing at as early a date as practicable, and it is difficult to believe that such an order could not be heard within a reasonable time less than six weeks. To set an order to show cause why a temporary injunction should not issue for hearing on so distant a day, and granting a restraining order meanwhile, in a case like the one before us, indicates a want of deliberate consideration of the defendant's rights. Days being 24 hours long, certainly a court, which is ordinarily occupied in trial of causes on the regular calendar only 5 hours in actual time per day, can find a few hours in which to grant a hearing on an order to show cause why important business concerns should not be suspended pending a suit which may last for a long time. To add to the danger of so long a postponement of the hearing, we notice that the restraining order was issued without a bond. We are not to be understood as saying that a bond should or should not have been required in case the restraining order had been set in operation for a short time only, but we do say that cases are exceptional where it would not be advisable to require a bond.

Section 1722 of the Code of Civil Procedure, as amended February 28, 1899 (Laws of 1899, page 146), provides for

appeal from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, but does not provide for appeal from an order granting or refusing a restraining order; and holding, as we do, that there is a distinction made in Section 873 of the Code of Civil Procedure between an injunction and a restraining order, we have concluded that there is no appeal from an order granting or refusing a restraining order pending the hearing of an order to show cause why an injunction should not issue.

It is not necessary, in view of the opinion expressed, to consider the point of the alleged want of proper verification to the complaint in the cause, and the further point that no bond was required.

The petition for an order of *supersedeas* is denied.

Denied.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE PIGOTT: I dissent. I am of the opinion that a restraining order is a species of injunction order, and is an order from which an appeal lies by virtue of Section 1722 of the Code of Civil Procedure as amended in 1899. I concur, however, in the remarks of the majority of the Court touching the duty of district courts in the matter of restraining and injunction orders.

PARROT SILVER & COPPER COMPANY, RESPONDENT, *v.* HEINZE ET AL., APPELLANTS.

(No. 1,601.)

(Submitted January 18, 1901. Decided March 11, 1901.)

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25 192
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25 520

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25 139
41 555

Mines—Mining Location—End and Side Lines—Extralateral Rights—Common Law Rights—Strike of Vein—Crossing side Line—Crossing End and Side Line—Appeal—Injunction.

1. Where the owner of a mining claim sought to restrain the owner of a neighboring claim from removing ore from beneath the surface of plaintiff's claim, and the issue was as to the course of defendant's vein across his claim, and the evidence was conflicting, *held,* that the granting by the lower court, after a hearing, of an injunction *pendente lite*—being so largely a matter of discretion, would be sustained upon appeal, there being substantial evidence tending directly to support plaintiff's contention as to the strike of the vein.
2. The granting of a preliminary injunction will be sustained upon appeal where there has been a reasonable showing made in support of the application in the court below.
3. Where a vein on its course crosses two opposite side lines of the mining claim, such side lines thereby become in fact end lines, and the locator cannot follow the vein, either on its dip or strike, beyond vertical planes drawn through the side-end lines.
4. Where the apex of a vein passes through one of the parallel end lines and a side line, the extralateral rights of the locator are bounded by the vertical plane of such end line and a parallel plane extended downward through the point where the apex crosses the side line.
5. A grant from the United States under the laws regulating the disposition of mineral lands differs from a common law grant in two respects only, to-wit: (1) it is enlarged by the addition to it of certain conditional extralateral rights, and (2) it is subject to the conditional extralateral rights of neighboring locators or patentees or their successors.
6. Under Revised Statutes of the United States, Sec. 2322, where the apex of a vein is in defendant's location, but he has no right to follow it beyond the vertical plane of his south line owing to such line being an end line, plaintiff, whose location is situated south of that of defendant, is entitled, as against defendant, to the ores of said vein beneath plaintiff's surface.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

SUIT by the Parrot Silver & Copper Company against A. P. Heinze and others to determine the title to ore bodies beneath the surface of plaintiff's mining claim, and for injunction *pendente lite* to restrain defendants from removing ore therefrom. From an order granting the injunction, defendants appeal. Affirmed.

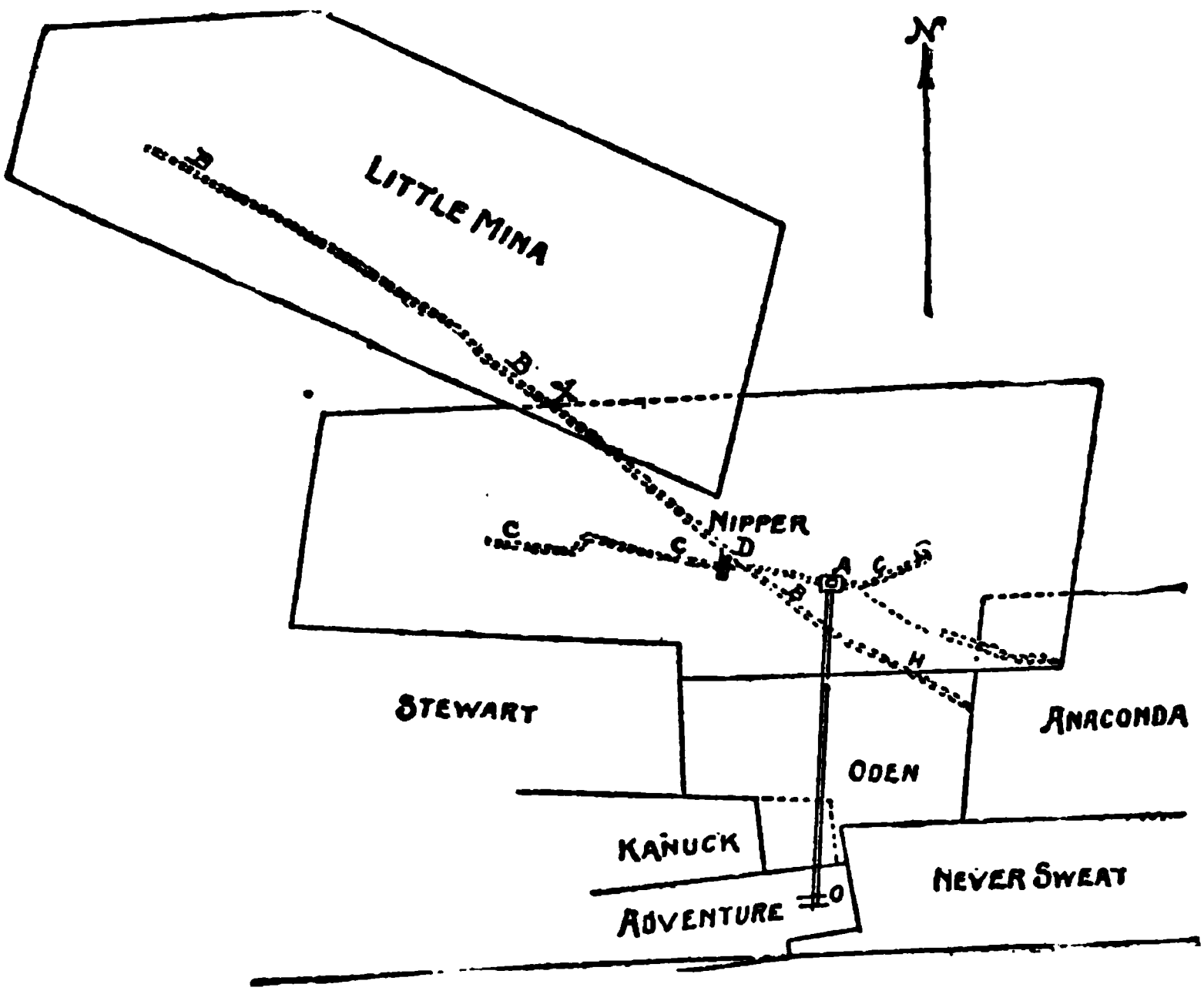
Messrs. McHatton & Cotter and *Mr. J. M. Denny,* for Appellants.

Mr. William Scallon, Mr. T. J. Walsh and *Mr. J. K. MacDonald,* for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

Action in the nature of ejectment to determine the title to certain openings and ore bodies beneath the surface of the Adventure mining claim, situate in Silver Bow county. The plaintiff, upon filing the complaint, asked for an injunction *pendente lite* to restrain defendants from removing the ores in question. From an order granting the injunction the defendants have appealed.

The principal question presented by the appeal can best be understood by reference to the subjoined diagram, which illustrates the contentions of the parties:



The plaintiff is the owner of the Adventure claim, with all the rights conferred by a patent thereto from the United States. The defendant F. Augustus Heinze is the owner of thirty-one undivided thirty-sixths of the Nipper claim, also patented, lying to the north. When this controversy arose the defendant Arthur P. Heinze was in possession of the Nipper claim as lessee of the interest of F. Augustus Heinze, and was engaged

in mining and extracting ore at the point O, beneath the surface and within the vertical planes passing downward through the boundaries of the Adventure claim. These operations were conducted through a "working winze" descending into the earth from the surface within the boundaries of the Nipper claim at A, and following the vein on its dip to the south at an angle of about 75 degrees through the intervening country to the point O, at a depth of 1,300 feet below the surface. The plaintiff admits that the ore bodies at this point have their apex in the Nipper claim, but contends that the evidence shows that this apex, instead of crossing the end lines of the Nipper claim, follows the course indicated by the line B, B, B, passing across the north side line of the Nipper into the Little Mina at X, toward the northwest, and through the south side line into the Oden claim at H, and thence across the east end line of the Oden into the Anaconda, toward the southeast. This being the condition of the vein, it is confidently asserted that the Nipper claim has no extralateral rights, and that, therefore, since none of the intervening claims have any part of the apex, so as to give them extralateral rights, the ore bodies in controversy belong to the plaintiff by virtue of what counsel assert are its common-law rights.

Defendants on their part contend that the evidence shows that the apex of the vein, as demonstrated by developments at and beneath the surface within the boundaries of the Nipper claim, follows the general direction of the side lines from near the west end line, through the point of discovery at D, and crosses the south side line into the Anaconda at a point near the southeast corner of the Nipper claim. The position of the vein under this contention is indicated by the letters C, C, C. There is some evidence to show that there is also a branch of this vein passing off in the direction indicated by the letter G.

There is a sharp conflict in the evidence introduced to support these adverse contentions as to the strike of the vein. The district court issued the injunction after a hearing. It is evident, from the situation as illustrated by the diagram, that that

court found in favor of plaintiff's contention. Otherwise, its action cannot be justified upon any reasonable theory; for, if the theory of the defendants is correct, it is clear that, in following the vein on its dip, they are merely asserting their extralateral rights granted under their patent, though in doing so they pass entirely through the adjoining claims on the south and enter plaintiff's claim.

Upon the evidence submitted the district court might have found in favor of defendants' contention; as it did not, however, and as there is substantial evidence tending directly to support plaintiff's contention, we do not feel justified in holding that the showing made by plaintiff was not reasonable, or that the court abused its discretion in finding as it did. The rule heretofore applied by this Court in this class of cases is that the granting of a preliminary injunction is so largely a matter of discretion that it will be sustained, upon appeal, where there has been a reasonable showing made in support of the application in the court below. (*Anaconda Copper Min. Co.* v. *Butte & B. Min. Co.*, 17 Mont. 519, 43 Pac. 324; *Montana Ore Purchasing Co.* v. *Boston & M. Consol. Copper & Silver Min. Co.*, 20 Mont. 528, 52 Pac. 273; *Butte & B. Consol. Min. Co.* v. *Montana Ore Purchasing Co.*, 21 Mont. 539, 52 Pac. 375; *Montana Ore Purchasing Co.* v. *Boston & M. Consol. Copper & Silver Min. Co.*, 22 Mont. 159, 56 Pac. 120.) For present purposes, therefore, we shall assume the finding in favor of plaintiff as to the course of the vein through the Nipper claim to be correct, and proceed to determine the legal question presented upon this theory of the case.

From this point of view it is apparent that the apex of the vein, in its course through the Nipper claim, crosses both side lines. The defendants, therefore, have no right to follow the vein on its dip in the direction of the Adventure claim. The supposed side lines of the Nipper claim are in fact end lines, and whatever rights its owners have to follow the vein in the direction of the Adventure are limited by a vertical plane passing downward through the south side line extended in its own

direction towards the west. "It may be considered as absolutely and finally settled that, where a vein on its course crosses two opposite side lines, the vein cannot be followed, either on its dip or strike, beyond vertical planes drawn through the side-end lines, and that the angle at which it crosses these side lines makes no difference in the application of the principle." (2 Lindley on Mines, Sec. 588.) This is a concise statement of the present condition of the law upon this subject as declared by the Supreme Court of the United States in *Flagstaff Silver Min. Co.* v. *Tarbet*, 98 U. S. 463, 25 L. Ed. 253, in *Iron Silver Min. Co.* v. *Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98, in *Argentine Min. Co.* v. *Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140, in *King* v. *Amy and Silversmith Mining Co.*, 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419, and in *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 659; and the question as to what are the extralateral rights of the owner of a claim in which the apex is situated as in the Nipper is not now open to further discussion.

It is equally as well settled by the adjudicated cases that the extralateral rights of the owners of the Oden claim, lying to the south between the Nipper and the Adventure, if they have any at all upon the vein in question, are limited toward the west by a vertical plane passing downward through the point II, and parallel with the east end line of that claim. Assuming that the end lines of the Oden are parallel, a condition is presented which was considered by this Court in *Fitzgerald* v. *Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803, and the conclusion there stated is that, where the apex of the vein passes through one of the parallel end lines and a side line, the extralateral rights are bounded by the vertical plane of such end line and a parallel plane passing downward through the point where the apex crosses the side line. This case was affirmed on appeal by the Supreme Court of the United States (171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87) upon the authority of *Del Monte Min. & Mill. Co.* v. *Last*

Chance Min. & Mill. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, decided on the same day. If the end lines are not parallel, the owners of the claim have no extralateral rights.

It thus appears that neither the owners of the Nipper nor of the Oden have, by virtue of their title to the portion of the apex within their respective boundaries, the right to follow the vein on its dip into the ground underlying the Adventure; in other words, these claims have no extralateral rights in the direction of the Adventure.

The question presented for determination upon this condition of affairs may therefore be stated thus: Assuming that the apex of the vein from which the appellants are extracting ore beneath the Adventure surface is in the Nipper ground, and that the vein in its strike crosses both of the side lines of the Nipper, so that the owners of the Nipper may not follow the vein on its dip to the south; can the plaintiff, who owns the Adventure claim, successfully assert title to the ores in that part of the vein beneath its surface and within the planes of its exterior boundaries? The defendants insist that it cannot do so, because, not having the top or apex of the vein within the exterior boundaries of the Adventure claim, it has no title to the part of the vein lying under the surface, notwithstanding defendants have no title thereto. In other words, this part of the vein was not granted to the plaintiff by its patent, and therefore the defendants, though without title themselves, commit no wrong upon plaintiff in entering beneath the surface and taking away ores to which it has no title. This contention has no foundation either in law or reason. Under the common-law rule as adopted in this country, a grant of lands without specific reservation conveys all rights above and beneath the surface, *usque ad coelum et ad orcum.* It is not uncommon, however, for such conveyances to make reservations of rights both above and below the surface, and the fact that this is true in a particular case in no way affects the validity of the particular conveyance.

In what respect does a grant from the United States under

the laws regulating the disposition of mineral lands differ from a common-law grant? To reach a solution of this question, regard must be had to the statute itself. Section 2322 of the Revised Statutes of the United States provides: "The locators of all mining locations heretofore made, or which shall hereafter be made, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." If this section stood alone, it would seem to restrict the rights of the locator to the use and enjoyment of the surface only for the purpose of following the vein upon its strike and dip under the prescribed limitations as to adjoining lands. Reading this in connection with the other provisions of the chapter, however, we find that it is "lands valuable for minerals" which are reserved from sale except as otherwise directed; it is "lands" in which the deposits are found which are open to occupation and purchase; it is "land claimed and located for valuable deposits" for which the patent may be obtained; and it is by virtue of the title secured to *land* that the purchaser obtains any right whatever with reference to mineral deposits therein. Upon a valid location of a definite portion of *land* is founded the right of possession. The patent grants the fee, not to the

surface and ledge only, but to the *land* containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant. On the other hand, this grant is subject to the right of an adjoining locator to follow his vein upon its course downward beneath the surface included in the grant. In these two respects only do the rights conferred by the statute differ from those held under a common-law grant. "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at the common law." (*Doe* v. *Waterloo Mining Co.* (C. C.) 54 Fed. 935; *Leadville Mining Co.* v. *Fitzgerald*, 4 Mor. Min. Rep. 385, Fed. Cas. No. 8,158.)

The passage quoted from the opinion of Judge Ross in *Doe* v. *Waterloo Mining Co., supra,* is directly in accord with the view expressed by the Supreme Court of Dakota in *Duggan* v. *Davey,* 4 Dakota 110, 26 N. W. 887, as well as with the result of *King* v. *Amy and Silversmith Mining Co., supra.* In the latter case the defendant was the owner of the Amy claim. The plaintiff and the defendant were tenants in common in the Non-Consolidated claim, having a common boundary with the Amy on the north. The apex of the vein in the Amy crossed both side lines and passed into the Non-Consolidated across the common boundary. The defendant had taken a large amount of ore from within that portion of the Non-Consolidated east of a plane passing downward through a line parallel with the end lines of the Amy at the point where the vein passed into the Non-Consolidated. This Court (9 Mont. 543, 24 Pac. 200) held that this ore belonged to the defendant by virtue of its right to follow the vein on its dip toward the north. Upon appeal the Supreme Court of the United States reversed the judgment of this Court, holding that the side lines of the Amy were its end lines, that the extralateral rights of the defendant

toward the north were limited by the vertical plane of the north side line; and that the plaintiff, in addition to a decree of partition demanded as the principal relief, was entitled to an accounting for the ores in controversy. By reference to the diagram in the opinion in 9 Mont. 569, 24 Pac. 201, it will be seen that the apex of the part of the vein to which the ore in controversy belonged was not in the Non-Consolidated, but in the Amy claim; and upon no other theory can the judgment of the Supreme Court of the United States be justified than that the owners of the Non-Consolidated were entitled to the ore by virtue of their common-law right under their patent. The same may be said of the result of the judgment in *Iron Silver Min. Co.* v. *Elgin Mining & Smelting Co., supra,* where similar conditions existed as to the apex of the ore in controversy.

Under the provisions of the statute, as they have been construed by these and the other cases heretofore cited, it is only the locator, or his successor, or a patentee, who has any right to follow a vein into the boundaries of an adjoining owner, and the latter, holding under a location or patent, is *prima facie* entitled to everything beneath his surface. He may assert this *prima facie* title to prevent intrusion by any one who cannot show that he comes with the right acquired by a compliance with the provisions of the statute. This conclusion is also in accord with the spirit of all the statutes regulating the disposition of the public lands, which make it manifest that it is the policy of the government to grant every right therein, except where express reservation is made.

Defendants cite and rely upon *Montana Co.* v. *Clark* (C. C.) 42 Fed. 626, and *Driscoll* v. *Dunwoody,* 7 Mont. 394, 16 Pac. 726, as conclusive of their contention. It is true that in *Montana Co.* v. *Clark,* Judge Knowles reached a conclusion directly contrary to that here stated, but that case is contrary to all the authorities so far as we are advised, and does not meet with our approval. The case of *Driscoll* v. *Dunwoody* is not pertinent, as it does not deal with any phase of the question involved in the case at bar.

The hearing in the court below was upon oral evidence and affidavits. Objection was made by defendants to the introduction of two of the affidavits offered by plaintiff, on the ground that they were immaterial and incompetent. The objection was overruled. Defendants allege error. We have examined the affidavits in question, and conclude that the court committed no prejudicial error in admitting and considering them. One of them was immaterial, but it is apparent that, if it had been excluded, the result would not have different.

The order of the district court is affirmed.

Affirmed.

CARR, RYDER & ADAMS CO., APPELLANT, v. CLOSSER ET AL., RESPONDENTS.

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(No. 1,457.)

ON MOTION TO STRIKE.

(Submitted March 4, 1901. Decided March 11, 1901.)

New Trial—Notice of Intention — Appeal — Transcript— Requisites.

Where, on appeal from an order granting a new trial, there was inserted in the transcript a copy of the notice of intention to move for a new trial, the notice not being made a part of any bill of exceptions or statement of the case on motion for a new trial, nor a constituent part of the judgment roll, as defined in Code of Civil Procedure, Sec. 1196, or in the absence of a bill of exceptions or statement on motion for a new trial containing it, one of the papers required by sections 1176, 1738, to be furnished to the appellate court, it will be stricken from the transcript.

Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

ACTION by the Carr, Ryder & Adams Company against Floyd Closser and another. Findings in favor of plaintiff were

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entered, and from an order granting a new trial the plaintiff appeals. On motion to strike out from the transcript notice of intention to move for a new trial. Motion granted.

Messrs. McHatton & Cotter, for Appellant.

Messrs. Walsh & James and *Mr. H. P. Napton,* for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

Findings in favor of plaintiff and against the defendants having been entered in the court below, the defendants moved for a new trial which was granted. The plaintiff has appealed from the order granting it. It now moves this Court to strike from the transcript the notice of intention to move for a new trial, on the ground that the notice is improperly included therein.

It appears that the clerk of the court below inserted in the transcript a copy of the notice of intention to move for a new trial without any request therefor upon the part of the plaintiff. The notice is not made part of any bill of exceptions or statement of the case on motion for a new trial; nor is it a constituent part of the judgment roll provided for and defined in Section 1196 of the Code of Civil Procedure; neither is it, in the absence of a bill of exceptions or statement on motion for a new trial containing it, one of the papers required by Sections 1176 and 1738 of the Code of Civil Procedure to be furnished by copy to this Court. It is therefore not a part of the transcript or record on appeal and must be stricken out.

It is therefore ordered that the copies of the notice of intention to move for a new trial, which appear twice in the transcript, be stricken therefrom.

Motion granted.

MR. CHIEF JUSTICE BRANTLY, having tried the cause in the court below, takes no part in the foregoing opinion.

MORRIS, RESPONDENT, v. MCLAUGHLIN ET AL., APPELLANTS.

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(No. 1,282.)

(Submitted March 4, 1901. Decided March 11, 1901.)

Appeal—Jurisdiction—Dismissal—Sale of Personal Property—Change of Possession—Sufficiency—Instructions.

1. Under Code of Civil Procedure, Sec. 1723, Subd. 2, which provides that an appeal may be taken to the Supreme Court within 90 days after the entry of a judgment of a district court on appeal from an inferior court, an appeal from a judgment of a district court rendered on an appeal from a justice's court, if not taken within 90 days after its entry, will be dismissed for want of jurisdiction.
2. In an action, where the question of fact to which instructions complained of were applicable was whether or not a sale of personal property was accompanied by immediate delivery and followed by an actual and continued change of possession of the chattels, instructions reviewed, and *held,* that in view of the charge, taken as a whole, the instructions complained of were not erroneous.

Appeal from District Court, Missoula County; Frank H. Woody, Judge.

ACTION by B. Morris against H. W. McLaughlin, as sheriff of Missoula county, and another. From a judgment for plaintiff on appeal from a justice, and an order denying a new trial, defendants appeal. Affirmed.

Mr. Jos. M. Dixon, for Appellants.

In the light of all the decisions of the courts in construing the law embraced within the provisions of Section 4491, the instructions complained of were erroneous and certainly highly prejudicial to the interests of the defendants and appellants herein. (*Merrill* v. *Hurlburt,* 63 Cal. page 494; *Bunting* v. *Saltz,* 84 Cal. 168; *Grum* v. *Barney,* 55 Cal. 254; *Woods* v. *Bugbey,* 29 Cal. 466.)

Mr. E. E. Hershey, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This action was commenced in the court of a justice of the peace. An appeal from the judgment of that court was taken to the district court of the county where the trial resulted in a judgment for the plaintiff, entry whereof was made on the 21st day of October, 1897. From an order denying a new trial the defendants have appealed. They have also, in form, perfected an appeal from the judgment.

1. Subdivision 2 of Section 1723 of the Code of Civil Procedure provides that within 90 days after its entry an appeal may be taken to the supreme court from a judgment rendered in a district court on appeal from an inferior court. The appeal from the judgment was taken on May 6, 1898, and not within 90 days after its entry on October 21, 1897. The appeal, being from the judgment of a district court rendered on appeal from a justice's court, not having been taken within 90 days after its entry, is dismissed for want of jurisdiction.

2. It is not contended that the evidence was insufficient to justify the verdict, nor that there was a failure of proof. The only errors complained of on the appeal from the order refusing a new trial are that instructions numbered 5 and 6 should not have been given. Counsel assert that these instructions were not applicable to the evidence, and do not state the law. With respect to the pertinency of the instructions it must suffice to say that they did not go beyond the evidence adduced. If therefore the court in its charge correctly declared the law the order denying a new trial was not erroneous.

The plaintiff brought this action to recover the possession of certain personal property, and the defendants justify under writs of attachment and execution issued at the instance of one of the defendants in an action brought against the vendor of the plaintiff, pleading that the chattels seized and sold under the writs were the property of the vendor and not of the plaintiff. The question of fact to which the instructions complained of were applicable was whether or not the sale made to the

plaintiff was accompanied by immediate delivery and followed by an actual and continued change of possession of the chattels. Under the evidence the jury might have found either for the plaintiff or the defendants upon this issue,—in other words, the inferences deducible from the evidence were sufficient to have justified a finding or verdict that the sale was or was not accompanied by immediate delivery and followed by an actual and continued change of possession of the things transferred.

The jury were in effect charged, that in order for them to return a verdict for the plaintiff they must find from the preponderance of the evidence that at the time the property was taken from him it was in his possession, and that there had been an immediate delivery thereof to him at the time he claims to have purchased it from his vendor; and that such immediate delivery had been followed by actual change of possession of the property and that the change of possession had been continuous up to the time of the alleged taking by the defendants; "that in order to constitute a sale of personal property good as against creditors of the vendor, there must be an immediate delivery, followed by an actual and continued change of possession. Each of these three things,—immediate delivery, followed up by an actual change, and continuous change, of possession, are essential, and if there has been a failure of either of these three conditions, then such sale is conclusively presumed to be fraudulent and void as against creditors. And in this case, although you may find from the evidence that there was an immediate delivery of the hay, and that the money was actually paid therefor, still, if such delivery was not followed up by an actual and continuous change of possession, the law conclusively presumes the sale a fraudulent one as against the creditors of the vendor, and you should find for the defendants. * * * Section 4491 of the Civil Code of Montana provides that every transfer of personal property, if made by a person having at the time possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing trans-

ferred is conclusively presumed to be fraudulent, and therefore void against those who are his creditors while he remains in possession. And if in this case you find from the evidence that the defendant Adam Reinhard was a creditor of H. R. Morris, the vendor, at the time of the sale of the hay from H. R. Morris to B. Morris, the plaintiff in this case, and such sale was not accompanied by an immediate delivery and followed by an actual and continued change of possession, that such sale is conclusively presumed to be fraudulent, and therefore void, and you should find for the defendants;" that if the jury believed that certain recited acts of the plaintiff were such as to give notice to third persons of his claim, and if they further believed from the evidence that the plaintiff immediately after the sale was in the absolute and exclusive control and possession of the chattels and that his vendor had ceased to have any possession or control of the hay, then, in order to show his ownership and possession as against the creditors of his vendor, the plaintiff would not be required to remove the chattels from the place where they were when the sale was made; that all the statute requires is that an immediate delivery must be made, the vendee must take actual possession, the possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee; the possession must be continuous, not taken to be surrendered back again, not formal, but substantial; but it need not necessarily continue indefinitely when it is *bona fide* and openly taken and is kept for such a length of time as to give general advertisement of the status of the property and claim of it by the vendee; that a transfer of personal property which is not accompanied by an immediate delivery and followed by an actual and continued change of possession is fraudulent and void as against the claim of any creditor who is such creditor during any of the time the person making the transfer remains in possession, and such creditor may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor; that the consideration paid by the purchaser,

or the good faith of the transaction, cannot be inquired into for the purpose of evading the force and effect of the law declaring such transfer fraudulent and void; that the rule of law is that the purchaser of goods or property must, for the protection of the public, take such possession as is usual and reasonable in view of all the circumstances of the purchase and character of the property purchased, and if he neglects this duty, then, as between himself and the creditors of the vendor, he must bear the loss resulting from his own neglect; that although the jury may believe from the evidence that the sale of the hay by the vendor to the plaintiff was actually made in good faith, and that the plaintiff actually paid the money therefor, still, notwithstanding these facts, if the sale of the hay was not followed by an immediate delivery and a visible, actual and continuous change of possession so as to give notice to the world that there had been a transfer of the property from the vendor to the plaintiff, then the law conclusively presumes such sale to have been fraudulent as against the creditors of the vendor. Instruction No. 5 recites the provisions of Section of 4491 of the Civil Code, and continues: "This section lays down no new rule as to what shall constitute a delivery; any delivery that is sufficient to pass the title as between the parties is still sufficient, the statute only adding that it shall be 'immediate;' the word 'actual' is designed to exclude the idea of a mere formal change of possession; and the word 'continued,' to exclude the idea of a mere temporary change." Instruction No. 6 is as follows: "In the determination of the question as to the kind of possession necessary to be given in order to make a sale of personal property valid as against creditors, regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. The law only requires that which could naturally be done in an honest and business-like transaction where there was no thought of fraud or concealment."

In view of the charge taken as a whole we perceive in in-

structions numbered 5 and 6 no error affecting the defendants. The last clause of the sixth instruction must be read and interpreted in connection with the rest of the charge, and when so considered it has evident reference to the acts constituting an actual and continued change of possession which could naturally be performed—that is, which in the nature of things it would be possible to perform to the end that such possession be taken and continued—in an honest and business-like transaction where there was no intent to commit a fraud or conceal the fact that a transfer had been made. The idea conveyed is that if the delivery be immediate and the subsequent possession actual and continued, the statute is complied with, although acts were omitted which, if done, would have further evidenced the sort of possession prescribed by the statute. The jury were not told that anything less than such delivery and possession would satisfy the statute, nor do we think the jury were misled or confused to the prejudice of the defendants by the language of either instruction, whatever might have been the effect had it been detached from and considered independently of the remainder of the charge. The rule declared by the sixth instruction was approved in *Cady* v. *Zimmerman,* 20 Montana 225 (50 Pac. 553).

The order refusing a new trial is affirmed. Let *remittitur* issue forthwith.

Affirmed.

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HAUSWIRTH, APPELLANT, *v.* MUELLER ET AL., RESPONDENTS.

(No. 1,664.)

(Submitted March 14, 1901. Decided March 15, 1901.)

School Election -- Bond Issue — Election Notice — Polling Places—Registration Notice.

1. **Under Political Code, Sec. 1940, declaring that notices of the holding of school elections, at which it is proposed to authorize bond issues, shall con-**

tain a statement of the time and place of holding the election, a notice not specifying the place is insufficient when attacked before the rights of third parties became vested, or the district is estopped, assuming that either condition might exist.

2. Where a notice of school election, at which it is proposed to authorize a bond issue, is insufficient for failure to designate the polling places, as required by Political Code, Sec. 1940, such insufficiency is not remedied by the fact that the notice of registration specifies the polling places, since Political Code, Sec. 1784, requiring notice of registration, does not require such notice to designate the polling places.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Simon Hauswirth against Henry Mueller and others, as trustees of School District No. 1, Silver Bow County, Montana. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Mr. C. E. White and *Mr. W. J. Jameson,* for Appellant.

Mr. Peter Breen and *Mr. Chas. R. Leonard,* for Respondents.

The only point made by appellant is with reference to the sufficiency of the notice of the election called in pusuance of the resolution of the school trustees. If the notice comes within the requirements of the law regulating the same, it is clear that the decree of the court below was correct in refusing the appellant the injunction asked for. Every step in the matter, beginning with the resolution of the board of trustees, was carried out in the manner provided by law. We contend that the notice of election was sufficient and was a full compliance with Section 1940 of the Political Code of Montana. (*Packwood* v. *Kittitas County* (Wash.) 45 Pac. 640; *Seymour* v. *City of Tacoma* (Wash.) 33 Pac. 1059; Dillon on Municipal Corporations, Sec. 3, and cases cited; 10 Am. & Eng. Ency. of Law, 2d Ed., 632.)

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This is an appeal from a judgment entered upon an agreed statement of facts submitted to the district court of Silver Bow county under the provisions of Sections 2050, 2051 and 2052 of the Code of Civil Procedure. The sole question involved is whether or not the notice of election hereinafter set forth was in substantial conformity with the provisions of the statute prescribing the contents of such a notice. The facts material to the consideration of the question are these: School district No. 1 of Silver Bow county is a district of the first class, the population being 60,000. On March 6, 1900, the board of county commissioners of Silver Bow county designated within the district nine polling places for the election to be held on April 7, 1900, and established 29 (?) registry precincts; this action was taken under Section 1773 of the Political Code, as amended by House Bill No. 63, approved March 3, 1899 (Laws of 1899, p. 57). On March 13, 1900, the board of trustees resolved that at the school election to be held on the 7th day of April following there be submitted to the electors of the district the question whether bonds should be issued and sold to the amount of $50,000, bearing 4 per cent. interest, redeemable in 10 years and payable in 20 years, for purchasing school lots and building school houses thereon. On March 22, 1900, there were posted in three public places in the district notices of which the following is a copy:

"NOTICE OF SCHOOL ELECTION.

"Notice is hereby given that an election will be held on Saturday, the 7th day of April, A. D. 1900, in School District No. 1, Silver Bow County, State of Montana, for the purpose of electing four school trustees for the term beginning on the third Saturday in April, A. D. 1900, and ending on the third Saturday in April, A. D. 1902. The following question will also be submitted to the registered voters in said School District, to be voted upon at said time, to-wit: 'Shall bonds be issued and sold to the amount of fifty thousand ($50,000) dollars, bearing four (4) per cent. interest, redeemable in ten (10)

years, and payable in twenty (20) years, for the purpose of purchasing school lots and building school houses thereon?' Polls will be open from eight o'clock a. m. to twelve m. and from one o'clock p. m. until eight p. m.

"(Signed) J. E. MORAN,
"County Clerk."

We observe, in passing, that publication in a newspaper does not seem to have been made.

On March 23, 1900, the board of county commissioners caused to be published in a daily newspaper a notice of registration describing the boundaries of each registry precinct, giving the location of the office, the name of the registry agent therefor, the date of and the hours during which the office of the registry agent would be open and during which persons might apply and be registered, and containing also a description of the polling places as designated on March 6th by the board of county commissioners. In pursuance of the notice which was posted on March 22d, an election was held on the 7th day of April, at which 3,794 ballots were cast, 2,875 being in favor of the issuance of the bonds and 919 to the contrary. The trustees were about to issue and sell the bonds when the plaintiff sought an injunction. Except as to the failure of the notice of election to state the places of holding it, the validity of the proceedings in respect of the proposed issue of bonds is conceded. The court below decided that the notice of election was sufficient and rendered judgment dismissing the plaintiff's "cause of action." The plaintiff has appealed. The cause was submitted on yesterday and it is deemed advisable to render a decision immediately.

Section 1962 of Chapter VI of Title III of Part III of the Political Code, under the authority of which Chapter school trustees are authorized to issue bonds, provides that an election to determine whether bonds shall be issued shall be held in the manner prescribed in Section 1243 of Title III of Part III of the Political Code. No section bearing that number is found in Title III. Counsel for the defendants frankly state that the

trustees proceeded under Section 1940 in the matter of calling the election for the issuance of the bonds. Examination of the various provisions of the Political Code touching the right to issue bonds and to provide extraordinary funds for school purposes, makes it evident that the supposed Section 1243 (which does not exist) was inadvertently used for Section 1940, and that by a misprision or clerical error "1243" was inserted where the legislative assembly intended to put Section "1940." If this be not true, then there is nowhere in the statutory law any provision prescribing the manner of calling and holding an election for the purpose of determining whether school district bonds shall be issued.

Section 1773 of the Political Code, as amended by House Bill No. 63, approved March 3, 1899, and appearing on page 58 of the Session Laws of that year, provides that the board of county commissioners shall at least 30 days before the annual election of school trustees designate and establish a suitable number of polling places and create an equal number of election precincts to correspond and define their boundaries. The following is an excerpt from Section 1940, *supra*: "Such election shall be called by posting notices in three public places in the district for at least fifteen days before the election and conducted as nearly as practicable, according to the provisions herein made for holding annual school elections. The notice shall contain the time and place of holding the election, the amount of money proposed to be raised, and the purpose or purposes for which it is intended to be used." Section 1940b of Senate Bill No. 44, approved March 8, 1897, appearing on page 135 of the Session Laws of 1897, contains the same provision, with the additional requirement of publication of the notice in a newspaper where the school board is composed of more than three trustees. It is apparent that the notice the validity of which is questioned fails to designate any place for holding the election. In our opinion the notice of election was fatally defective and must be so declared, at least when its validity is assailed before the rights of third persons become

vested or the district itself is estopped—assuming that either condition might exist. The statute prescribes the contents of the notice of election. That notice shall state the place where the election will be held. The purpose of this provision is to impart information to the electors so that they may know where they can deposit their ballots and thus express their wishes concerning the question whether a tax shall be imposed upon property. Whatever may be the rule with respect to the election of public officers, we are satisfied that where the statute prescribes that the notice of an election for the purpose of burdening property with a tax shall specify the place at which electors may vote, the provision is mandatory and must be substantially complied with. No requirement of the election law is more important to be observed than that the notice of election should clearly state the particular place where the election is to be held. (*People* v. *Caruthers School Dist.*, 102 Cal. 184, 36 Pac. 396.) *State ex rel. Stanford* v. *School Dist. No. 1 of Cascade Co.*, 15 Montana, 133, 38 Pacific Reporter, 462, while not directly in point, is not altogether without pertinency to the question presented in the case at bar. The rule announced in *Hilburn* v. *St. Paul M. & M. Railway Co.*, 23 Montana, at page 247, 58 Pacific Reporter, 551, 811, accords with the principle which we here apply.

The defendants suggest that the language quoted from Sections 1940 and 1940b does not require that the polling places should be designated in the notice and that, if such had been the design of the statute, the wording would have been "the places of holding the election," or "the different polling places within the school district," instead of the word "place." We do not perceive any force in this suggestion. The statute means that the notice shall specify each place where the election is to be held, that is to say, each polling place. The singular number when used in the Political Code may, as declared by Section 16 of that Code, include the plural and the plural the singular; and such was likewise the common-law rule.

The defendants contend that notice was given to the qualified

electors of the places at which they might vote. Counsel argue that since the notice of registration described the polling places there was a substantial compliance with the law. The flaw in the argument consists in the fact that the notice of registration prescribed by Section 1784, which was added to the Political Code by substitute for Senate Bill No. 56, approved March 6, 1897 (Laws of 1897, p. 136), is not required to state or specify the polling places, and therefore the description in such notice of the places where the election would be held was not constructive notice to those entitled to vote. The only means by which information of the situation of the polling places may be conveyed seems to be the notice of election given in conformity with Sections 1940 and 1940b, *supra*. We are not to be understood as holding that a designation of the polling places by a notice of registration in compliance with a statute requiring the notice to state the polling places would satisfy the demand of Sections 1940 and 1940b that the polling places shall be designated in the notice of election. That question is not before us.

It is therefore ordered that the judgment entered on the 7th day of March, 1901, be reversed and the cause remanded with directions to the district court to proceed in conformity with the views expressed in this opinion. Let *remittitur* issue forthwith.

Reversed and remanded.

PATTERSON, RESPONDENT, v. PFOUTS, APPELLANT.

(No. 1,304.)

25 168
126 494

ON MOTION TO DISMISS APPEALS.

(Submitted March 19, 1901. Decided March 19, 1901.)

Appeal—Rules of the Supreme Court—Briefs—Specifications of Error—Dismissal—Affirmance.

When the appellant's brief is not in substantial conformity with the Rules of the Supreme Court, the appeal will be dismissed on motion of the respondent; in the absence of such motion the Court will affirm the order or judgment appealed from.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by W. H. Patterson against W. G. Pfouts. From a judgment in favor of plaintiff, defendant appeals. Motion to dismiss. Granted.

Messrs. Corbett & Clayberg and *Messrs. Stapleton & Stapleton,* for Appellant

Messrs. McHatton & Cotter, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

The respondent moves that the appeals from the order denying the motion for a new trial and the judgment be dismissed for the reason that the brief of appellant does not conform to the requirements of Subdivision 3 of Rule X of this Court.

Examination of the brief filed in behalf of the appellant discloses that it fails to contain a specification of the error or errors relied upon. We need not consider the other alleged defects in the brief. Upon authority of the numerous cases

upon this subject, the last being *Harrington* v. *Smith,* 25 Montana, 111, 63 Pacific Reporter, 1036, the appeals are dismissed. When the appellant's brief is not in substantial conformity with the rules the appeal will be dismissed on motion of the respondent, pursuant to Subdivision 5 of Rule X, as was done in *Anderson* v. *Carlson,* 23 Montana, 43, 57 Pacific Reporter, 439, and in other cases; in the absence of such motion the court will affirm the order or judgment appealed from, as was done in *Harrington* v. *Smith, supra,* in *Rehberg* v. *Greiser,* 24 Montana, 487, 63 Pacific Reporter, 41, and in other instances.

The appeals are dismissed.

Dismissed.

HICKEY ET AL., RESPONDENTS, *v.* PARROT SILVER & COPPER CO., APPELLANT.

(No. 1,549.)

25 164
32 150

(Submitted January 17, 1901. Decided March 21, 1901.)

25 164
f37 334

Receivers — Mines — Operation — Injunction — Sufficiency of Bond—Lease Expiring Before Final Adjudication—Ascertainment of Damages—Preservation of Rights—Petition by Party in Possession.

1. Certain parties claiming title to a mine sued for an injunction restraining certain others and their lessee from working the mine. The lessee's estate would terminate before a final adjudication of the matter could be had, and the restraining order sought would do him great damage. *Held,* that a receiver could not be appointed on the ground that the bond which would be required on granting the restraining order, suit on which would be the lessee's only remedy, would not afford such lessee adequate protection, since it would be presumed that the bond required would be sufficient to protect the lessee from any loss occasioned by such order.
2. The Court would not appoint a receiver because the damages the lessee would suffer by reason of such restraining order would be difficult of ascertainment and proof.
3. Under Code of Civil Procedure, Sec. 950, Subd. 6, authorizing courts to appoint receivers in all cases "where receivers have heretofore been appointed by the usages of courts of equity," the lessee in possession of a certain

mine, the operation of which was enjoined pending the settlement of a dispute as to title between the lessor and others, was not entitled to the appointment of a receiver, with power to remove ore, on the ground that his lease would expire before final adjudication, and hence be rendered valueless by the injunction, since the receivership was not necessary to the preservation of the rights of the parties.

4. Under Code of Civil Procedure, Sec. 950, Subd. 6, a receiver will not be appointed in an action for an injunction against trespasses with power to take away the substance of the estate, on the ground that the defendant will enjoin or has enjoined the plaintiff in possession from extracting ore from the property.

5. A party in possession of, and asserting title to, mining property may not of his own volition over the objection of the party likewise asserting title thereto surrender the possession to the court for operation by it—through a receiver—of the property.

6. The power to appoint a receiver is to be exercised with conservatism and caution; a strong showing should be made that the appointment is necessary to the preservation of the thing or right in controversy,—especially is this true when the court is invited by one of the parties to embark property seized by it through its receiver in industrial enterprises, and expose it to the hazard incident to the conduct of such a business.

7. A lessee is no more entitled to have a receiver appointed than is his landlord.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Michael Hickey and others against the Parrot Silver & Copper Company. From an order appointing a receiver of certain property claimed by both parties, defendant appeals. Reversed.

Mr. William Scallon, Mr. J. K. MacDonald and *Mr. T. J. Walsh,* for Appellant.

Messrs. McHatton & Cotter and *Mr. James M. Denny,* for Respondents.

The petitioner in this case was entitled to the appointment of a receiver under the peculiar facts of the case, and to protect his interest as lessee. His rights as lessee could not be protected in any other way, and were a receiver refused he would be irreparably injured and his property rights as such lessee entirely taken from him and destroyed. It is an elementary principle of equity, which requires no citation of authorities in its support, that a court of chancery has full power in any

action in which it has jurisdiction of the subject matter and the party to make any order necessary to protect the rights of the parties and to preserve the matter in dispute. In this case there is and can be no question as to the jurisdiction of the court as a court of equity over the subject matter of the suit and the parties thereto. The complaint seeks purely equitable relief; it is an appeal to the court to exercise its equitable powers for the protection of the plaintiffs. Where the equity jurisdiction of a court is invoked for the protection of the rights of the plaintiffs it has full authority over the entire suit and to determine all questions which may arise therein and be necessary for determination, whether they be legal or equitable. In other words, where the exercise of the equity jurisdiction of the court can properly be invoked for the protection of any right, and that is the purpose of the action, it will determine all legal questions which may arise in the action and administer the equitable relief. It is no objection to the jurisdiction of the court, as a court of equity, to say that it may not grant the relief prayed for in this action because the defendant might raise a dispute as to the title of the plaintiff. The court well knows that in every instance in which equity is appealed to to grant an injunction for the protection and preservation of property, an issue may be raised as to the plaintiff's legal title and that a determination of such issue may be necessary to the granting of the ultimate equitable relief to which the plaintiff is entitled, but that in every such instance the court of equity has absolute and complete jurisdiction to determine such questions, without the aid of a jury, and to enter such decree as may be in consonance with the rights of the parties.

While the distinction in forms of actions has been abolished in this state, it is only as to form that the abolition has occurred; the distinction in character is maintained as clearly as ever, so that, while an action may be commenced in the courts of this state by filing a complaint containing a statement of the facts relied upon and without indicating whether the action is brought at law or in equity, the court will apply the

principles of law or equity according to the nature of the action itself. If this action should be considered in its essential character as one to quiet title, or to remove a cloud from the title of the plaintiff instead of an action for an injunction, it would nevertheless be an action in equity, and the court, in its trial and determination, would follow the practice in equity and apply equitable principles thereto. Suits to quiet title and to remove clouds from title are among the most numerous kinds of actions which courts of chancery have heretofore entertained. That an action by a party in possession to quiet his title to real estate is one in equity, is amply attested by the following cases: *Mantle* v. *Noyes,* 5 Mont. 274; *Mantle* v. *Noyes,* 127 U. S. 348; *Doe* v. *Waterloo Mining Co.,* 43 Fed. 219-221; *Fitzgerald* v. *Clark,* 17 Mont. 100, 139; *Mercer Mining Co.* v. *Freeman,* 7 Cal. 317; *Castroe* v. *Barry,* 79 Cal. 443; *Hammer* v. *Garfield Mining Co.,* 130 U. S. 291-296; *Bullion-Beck Co.* v. *Eureka Hill Mining Co.,* 11 Pac. 515; *Del Monte Mng. and Milling Co.* v. *Last Chance M. and Milling Co.,* 18 Sup. Court Rep. 895; *Walrath* v. *Champion Mining Co.,* 18 S. C. Rep. 909; *Waterloo Mining Co.* v. *Doe et al.,* 82 Fed. 45; *St. Louis Mng. Co.* v. *Montana Co.,* 58 Fed. 129; *Cassidy* v. *Sullivan,* 64 Cal. 266; *Harlan* v. *Challen,* 110 U. S. 15; *Grand Rapids I. R. Co. et al.* v. *Sparrow et al.,* 36 Fed. 210; *Taber* v. *Cook,* 15 Mich. 322; *Larkin* v. *Wilson,* 28 Kansas 513; *Harding* v. *Fuller,* 144 Ill. 308; *Allen* v. *Hanks,* 136 U. S. 361; *Frost* v. *Spitley,* 121 U. S. 556.

That the defendant in this case is not entitled to a trial by jury, see the above cases; also the following: *In re Burrows,* 7 Pac. 148; *Hopkins* v. *State Capitol Commission,* 16 Cal. 253; *Weil* v. *Kune,* 49 Mo. 158; *Brandt* v. *Wheaton,* 52 Cal. 430; *Reynolds* v. *Lincoln,* 71 Cal. 186; *Benson* v. *Shortwell,* 87 Cal. 60; *Lynch* v. *Metropolitan Ry. Co.,* 11 L. R. A. 287; *Wiggins* v. *Johnston,* 30 L. R. A. 754; *State* v. *Saunders,* 18 L. R. A. 646; *Hall* v. *Armstrong,* 20 L. R. A. 366.

Subdivision 6 of Section 950 of the Code of Civil Procedure provides for the appointment of a receiver in all other cases

where receivers have been heretofore appointed by the usages of the courts of equity and means simply this: That in all cases in which the courts have heretofore, in the exercise of the general chancery powers, found it necessary or desirable to appoint a receiver in order to preserve the rights of the parties, or in which they may hereafter find it necessary to exercise that authority, they have a right to appoint a receiver. (*Bateman* v. *Supreme Court*, 54 Cal. 289.) It is certainly more in accord with the principles of equity that a receiver should be appointed to mine the ore and preserve the proceeds for the party entitled thereto, rather than that an injunction should be issued which would effect an entire destruction of the leasehold rights of the plaintiff Arthur P. Heinze, and that he should be left to pursue an inadequate remedy at law, by means of a suit against the defendant seeking to recover the damages which he would sustain thereby. (Pomeroy, Equity Jur. Sec. 1357; *Palmer* v. *Israel*, 13 Mont. 213.)

An injunction is a necessary concomitant of an order appointing a receiver. That a court, upon an application for an injunction, may appoint a receiver, is well established. (*Whitney* v. *Buckman*, 26 Cal. 448; *Halawacke* v. *Bowman*, 8 N. W. 102; *Tregaskis* v. *The Judge*, 11 N. W. 293.) Courts have even, in cases where they have granted injunctions against both parties to an action, afterwards appointed a receiver therein, as the cases hereafter cited will show.

The authority of the court to preserve the property, the subject of litigation, pending the action until final judgment, and then apply it as justice may require, is too manifest to admit of question, and such authority should be exercised where it appears there is reasonable ground to believe that the plaintiff may recover and the interference of the court is necessary to protect the rights of Arthur P. Heinze. (*Crecroft* v. *Morehead*, 67 N. Car. 422; *Morris* v. *Willard*, 84 N. Car. 283.)

The jurisdiction exercised by a court of equity in administering relief by the extraordinary appointment of a receiver *pendente lite* is a branch of their general preventive jurisdic-

tion, being intended to prevent injury to the thing in controversy and to preserve it for the security of all parties in interest, to be disposed of as the court may finally direct. (High on Receivers, Sec. 3; *Deep River Gold Mining Company* v. *Fox,* First Morrison's Mining Reports, 296; *Parker* v. *Parker,* 82 N. C. 165.) This doctrine is also recognized by the federal court in the case of *Thomas* v. *Natnahala Marble and Talc Company,* 58 Fed. 485, where the court said that it was in conformity to the principles of equity as administered everywhere. See also *Smith* v. *Jones,* 101 N. Car. 360; *Hell* v. *Taylor et al.,* 22 Cal. 191; *Weise* v. *Welsh,* 30 N. J. Eq. 431. See also the following authorities, which we submit as supporting the court's right to make the order appealed from: *Harris* v. *Reynolds,* 13 Cal. 518; *Reynolds* v. *Harris,* 14 Cal. 676; *Abel* v. *Lowe et al.,* 17 Cal. 234; *Duncan* v. *Campbeau,* 15 Mich. 414; *Goodale* v. *District Court,* 56 Cal. 26; High on Receivers, Secs. 556-558-576; Pomeroy, Equity Jur., Secs. 1331-1333; *Orphan Asylum* v. *McCartee,* Hopkins Chancery, N. Y. 427; 15 Am. & Eng. Enc. Law, p. 605; High on Receivers, p. 17; *Elk Ford Oil and Gas Co.* v. *Foster,* 99 Fed. 495; Smith on Receivers, Sec. 38; *Nevada Sierra Oil Co.* v. *Home Oil Co.,* 98 Fed. 673; High on Receivers, Sec. 4.

Under the peculiar circumstances in this case the appointment of a receiver is the only means whereby the rights of Arthur P. Heinze can be preserved and protected. (*Appeal of Rankin et al.,* 16 Atl. Rep. 82.)

On the question of the practice of courts of equity in the matter of appointing receivers, we call the court's attention to the cases of the *Butte & Boston Mining Co.* v. *John F. Forbis,* and others, in the United States Court, Ninth Circuit, District of Montana; *Nevada Sierra Oil Co.* v. *Home Oil Co.,* 98 Fed. 673; *Elk Ford Oil & Gas Co.* v. *Foster,* 99 Fed. 495.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This is an appeal by the defendant from an order of the district court of Silver Bow county made on the 16th day of

May, 1900, appointing one McLaughlin receiver of so much of the Nipper lode mining claim as lies west of a plane drawn through a point on the north side line of that claim 205 feet northwesterly from the southeast corner of the Little Mina lode mining claim, and parallel with the vertical planes of the end lines thereof, together with all the veins and ore bodies belonging to that part of the Nipper, including all extralateral rights, and authorizing and directing him to work and mine such part and cause a reduction of the ores by him extracted therefrom. The appointment was made on the petition of Arthur P. Heinze, one of the plaintiffs, and after the issues were framed in the action.

The state of the pleadings at the time the petition was filed was this: The complaint stated that the plaintiffs, other than the Heinzes, were the owners of thirty-one undivided thirty-sixths of the Nipper lode mining claim; that they had leased to F. Augustus Heinze their interest and had agreed to sell it to him upon the fulfilling of certain conditions, and that he was entitled meanwhile to mine the property; that F. Augustus Heinze assigned or sublet to Arthur P. Heinze, who, at the time the complaint was filed, was and for a long time has been in and entitled to the possession of the interest mentioned; that the defendant had wrongfully entered into the Nipper lode claim by means of a shaft and underground workings and had mined and carried away ores therein contained, and was then so engaged and threatened to and, unless restrained by the court, would from day to day continue to enter upon the claim and mine, extract, and convert them to its own use; that the claim is valuable almost entirely for the ores of copper, gold, and silver, which it contains; that the plaintiffs have no means of knowing the amount and value of the ores which had already been extracted by the defendant, and would be unable to ascertain the amount and value which the defendant would take away in the future unless enjoined. The relief prayed for was an injunction against the threatened trespass.

By answer the defendant admitted that it had entered within

the vertical planes of the boundaries of the Nipper lode mining claim, but denied that it had removed or threatened to remove any ore therefrom, alleging that its operations had been confined to developing the vein so as to determine the true apex thereof. It denied the assignment or subletting to Arthur P. Heinze, and for an affirmative defense alleged ownership of the Little Mina lode claim adjoining the Nipper on the north, and averred that it was engaged in the prosecution of development work on the vein, the apex of which is within the Little Mina lode claim; that the vein on its dip so far departs from the perpendicular as to pass beyond the vertical planes of the south side line of the Little Mina lode claim and to enter the Nipper claim. It alleged that it had not entered within the Nipper lode claim upon any vein which it had not followed downward on the dip from its apex within the Little Mina. These allegations were put in issue by the replication filed September 20, 1899, which seeks a decree quieting title in plaintiffs.

On the 5th day of March, 1900, the plaintiff Arthur P. Heinze filed his petition for the appointment of a receiver, setting forth in substance these alleged facts: Under a certain lease the petitioner is in possession of an undivided thirty-one–thirty-sixths of the Nipper lode mining claim and is engaged in mining the ores from the veins within the claim, and is entitled to remain in possession and mine and extract the ores until the 12th day of July, 1901, on which day his lease will expire. The defendant, asserting ownership of the Little Mina lying to the north of the Nipper, has commenced an action against F. Augustus Heinze and the Montana Ore Purchasing Company, alleging that there is a vein which has its apex in the Little Mina claim and which in its downward course departs into the Nipper claim and asserts that the part of the Nipper vein lying between vertical planes, one drawn downward through the westerly line of the Little Mina and one through a point 205 feet northwesterly from the southeast corner of the claim, measured along its south line and extended in their

own direction to an intersection with the Nipper vein within the Nipper claim, belongs to the defendant and is a portion of the vein which has its apex in the Little Mina claim. The assertions so made by the defendant are made in bad faith and fraudulently and in collusion with the Boston & Montana Consolidated Copper & Silver Mining Company, the Butte & Boston Consolidated Mining Company, the Anaconda Copper Mining Company, the Colorado Smelting & Mining Company, the Washoe Copper Company, the Amalgamated Copper Company, the Standard Oil Company, Lewisohn Bros., Marcus Daly, H. H. Rodgers and others and as a part of the conspiracy entered into by the defendant and the corporations and persons mentioned for the purpose of preventing the owners of the thirty-one-thirty-sixths interest in the Nipper lode claim, and the petitioner, from mining the ores therefrom, and for the purpose and with the intent by means of false testimony and affidavits to obtain an injunction preventing the mining of the ores, with the intention and for the purpose, and by the means so alleged, the defendant is threatening to obtain, and "very likely" will obtain, an injunction against the petitioner enjoining him from mining the ores from the Nipper claim and vein "by reason of the said matters and the means which it and its co-conspirators will employ, and by reason of the fact that it is quite usual for the courts to grant an injunction where one party claims that another is trespassing upon a vein belonging to it, and the testimony offered on the hearing of an application for an injunction is contradictory or conflicting; and that said Parrot Silver & Copper Mining Company is now threatening to and will, as plaintiff is informed and believes, within a short time institute an action or proceeding against him for the purpose of preventing him, by means of a restraining order or injunction, from mining or taking away any of the ores from said portion of said Nipper vein lying between the planes aforesaid; and that by reason of the conspiracy existing between said Parrot Silver & Copper Company, and the other companies

and persons hereinafter mentioned, and by reason of the fact that it and they will procure witnesses to wrongfully, fraudulently and falsely testify that in their opinion the said Nipper vein has its apex for a portion of its length in the Little Mina claim, and by reason of the fact that the location and ownership of the said Nipper vein cannot be finally determined in such a proceeding, and the court may feel obliged, under its rules of practice, to enjoin this plaintiff from mining or carrying away any of the ores therefrom;" if such action be brought, as petitioner is informed and believes it will be, it cannot be tried for several years, in consequence of which the title of the owners of the thirty-one-thirty-sixths in the Nipper lode claim to the vein and ore will be brought into and held in dispute by the defendant, and petitioner will be enjoined from mining or carrying away any of the ores during the term of his lease, whereby the lease will be rendered valueless to him. The claims and pretenses of the defendanat to the vein and ores are without foundation in right or equity and are entirely fraudulent, "and are put forth and will be maintained, not for the purpose of protecting any right to said property, but for the purpose of irreparably injuring this plaintiff and destroying his business and business prospects, so far as it can, and also in an attempt to confiscate and acquire the property and property rights of plaintiff's associates, and particularly of F. Augustus Heinze and the Montana Ore Purchasing Company in the Butte district." The Montana Ore Purchasing Company owns several mines and interests in mining claims and is engaged in carrying on a general mining and smelting business in Silver Bow county; and it and the Johnstown Mining Company are owners of a large smelting and reduction plant used for the treatment of ores obtained from other persons. F. Augustus Heinze, brother to petitioner, and petitioner are largely interested in the Montana Ore Purchasing Company and its affairs. In 1897 the Boston & Montana Consolidated Copper & Silver Mining Company, its officers and agents, and Lewisohn Brothers

and others, as petitioner is informed and believes, entered into an unlawful conspiracy against the plaintiff, his brother, the Montana Ore Purchasing Company and those associated with them in the ownership of mining property and in the business of smelting and reducing ores in Silver Bow county, with the purpose and intent and with the express agreement and understanding to bring numerous fraudulent and unfounded actions against them respecting their property and property rights, and by means of false and fraudulent statements and testimony to injure and destroy their business reputation and credit, and to prevent them from exercising and enjoying their property and rights and obtain injunctions and harass and annoy them with expensive litigation. Thereafter the Butte & Boston Consolidated Mining Company, its officers and agents, joined in the conspiracy for the purposes mentioned, and for the further purpose of obtaining the property of the Montana Ore Purchasing Company and the Heinzes at a great sacrifice and irreparable loss to them. The Boston & Montana Consolidated Copper & Silver Mining Company and its co-conspirators have continuously and in pursuit of the conspiracy brought numerous unfounded actions against the Montana Ore Purchasing Company and the Heinzes, and have obtained injunctions against them preventing them from mining the ores from their property, and many of the actions are still pending and cannot be finally determined for a long time. In pursuit of the said purpose and in the execution of the conspiracy the companies named, their officers, agents, and representatives, have published false and malicious charges against the Montana Ore Purchasing Company, its officers and agents, and against the Heinzes touching their integrity and business dealings and affecting their business and financial standing, designed to bring them into disrepute and to accomplish their business failure and ruin. Marcus Daly of the Anaconda Copper Mining Company, Rodgers and Rockefeller of the Standard Oil Company, and others, have, as the petitioner is informed and believes, formed a trust between the Anaconda Copper Mining

Company, the Washoe Copper Company, the defendant Parrot Silver & Copper Mining Company, and the Colorado Smelting & Mining Company for the purpose of controlling the mining and reduction of ores in Silver Bow county, and acquiring and controlling the ownership of the valuable mining properties situated therein, and have caused to be formed a trust corporation called the Amalgamated Copper Company, under the laws of the state of New Jersey, which corporation was so organized for the purpose of avoiding any supervision and control of the same by the state of Montana, and so that it might claim not to be governed by the laws of Montana. As plaintiff is informed and believes, one of the purposes of the Amalgamated Copper Company is to have the Washoe, Parrot, Colorado and Anaconda Companies, and their properties and property rights in Montana, transferred to it or to have the stock of these corporations transferred to it and owned and controlled by it; and as plaintiff is informed and believes, Daly, Rodgers, and Rockefeller own a majority of the capital stock of the Amalgamated Copper Company and control the corporation, and also own a large majority of the capital stock of the Anaconda Copper Mining Company, the Washoe Copper Company, the Colorado Smelting & Mining Company, and the defendant, and control and direct the affairs and policies of all these companies. It is the intention and purpose of the Amalgamated Copper Company and of Daly, Rodgers, and Rockefeller, and their associates, as soon as the same can be done, to have all of the property of the companies named transferred to the Amalgamated Copper Company, and have such corporations wound up and dissolved. The policy and business management of the Boston & Montana Consolidated Copper & Silver Mining Company and the Butte & Boston Consolidated Mining Company, as petitioner is informed and believes, were largely dictated and controlled by the Amalgamated Copper Company, its officers, agents, and representatives, and Daly, Rodgers, and Rockefeller, with the understanding between the persons named and the officers and represetatives of the corporations, that each and

all of them shall and will use all means which may be employed to that end to prevent the Montana Ore Purchasing Company and the Heinzes, and those associated with them, from carrying on the business of mining and reducing ores in Silver Bow county, and to burden and harass them with all manner of suits based upon pretended claims and to acquire all of their mining properties and mining rights, and their reduction and smelting plants to the end that the persons and corporations named shall be the owners and operators of all mining claims and smelting and reduction plants in the county, and that they may thereby be able to control the production of valuable ores and dictate and determine the wages which shall be paid for labor and the price of all supplies and merchandise and as well be able to influence the price of copper. These corporations and persons have united in the unlawful conspiracy against the Montana Ore Purchasing Company and the Heinzes and those associated with them, and are engaged in doing everything possible to effect their purposes. Within the last two years the Montana Ore Purchasing Company and the Heinzes and those associated with them have expended about $1,500,000 in the purchase of mining properties in Silver Bow county and in their endeavors to develop theretofore undeveloped ore bodies and in attempting to protect their rights to their properties. In almost every instance in which the petitioner and his associates have become the owners of mining property and have undertaken to develop the ore bodies therein and to extract and reduce them, some of the corporations named or their representatives or agents have laid false and fraudulent claims thereto for the purpose of preventing the carrying on of the mining business and the extraction and reduction of the ores therefrom; and in instances where the petitioner or his associates, or the Montana Ore Purchasing Company, have had the apex or apexes of veins within their own claims it has been falsely and fraudulently asserted and pretended by some of the companies mentioned, or by their representatives, that such

mining claims had no extralateral rights and that the owners could not follow such veins on their dip beyond planes drawn downward through the vertical boundaries; and where the veins apex in such claims and ores in any considerable quantity were found within the surface boundaries it has been fraudulently claimed that the veins do not apex in such claims but that they have their apex in some ground or claim alleged to be owned by some of the corporations, and that the ore bodies within the mining ground of the petitioner or those associated with him do not belong thereto. These false and fraudulent claims have been made in furtherance of the conspiracy; and by means of false and fraudulent testimony submitted in support thereof and which could not be detected by the court or judge to whom it was presented, and which could not, at the time, with absolute certainty and conclusiveness be shown by the petitioner and those associated with him to be false or without any foundation in fact, the conspirators have obtained injunctions against the petitioner, or those associated with him, preventing such ores from being mined, and when the petitioner or those associated with him have succeeded in establishing the invalidity of an injunction against them issued out of one court, the conspirators have almost immediately applied for an injunction in a different court on the same or other pretenses made regarding the same matter. The defendant, the Washoe Company, and the Anaconda Company are particularly conspiring against the petitioner uplawfully to prevent him from mining ores belonging to said interest in the Nipper lode claim and to prevent the owners of an undivided thirty-one–thirty-sixths interest from having any enjoyment of their property therein. The petitioner then pleads matter intended to exhibit the existence of the conspiracy in so far as the defendant, the Washoe Copper Company and the Anaconda Copper Mining Company are concerned. Petitioner's lease is very valuable and the amount and value of the ore which he can have mined and reduced from the Nipper lode claim, unless enjoined, cannot be ascertained,

and if he is restrained the lease will be valueless. In case an injunction should be obtained by the defendant against him, his only remedy against it, as he is informed and believes, would be upon such bond as the court would require on granting the injunction, and such bond and the remedy thereon would be entirely inadequate for his protection and he would be irreparably damaged. The ores in the Nipper claim are largely copper, which has the very high price at the present time of about 16 cents per pound,—about 5 cents per pound more than it had sold for for some years prior to 1899, and there is a very great likelihood that the price of copper will decline in the future and will perhaps in the next year or so fall to 11 cents a pound or less. The petitioner is at present extracting large amounts of ore from the part of the Nipper vein which is claimed by the defendant, and will in a short time be able to mine in the neighborhood of 400 tons a day from the vein which the defendant is asserting title to and is threatening to enjoin him from mining, and if enjoined he will suffer the loss of the profit which he will make in such mining of at least $6,000 per day. A large hoisting plant and machinery is upon the Nipper lode claim and extensive underground workings are therein, and a large number of men are employed as miners by the petitioner; if he is enjoined from mining the ores, it will result in a large number of men being thrown out of employment, and the Nipper lode claim and its equipment remaining idle for a long time. In order to protect the rights of the petitioner as against the defendant and those acting in aid and assistance of it, necessity exists for the appointment of a receiver with the powers which were afterwards conferred upon him by the order of appointment.

The defendant sought to purge the petition of matter which it asserted to be immaterial, but the motion in that behalf was denied. A demurrer to the petition was also overruled. To the petition the defendant answered. It admits that the defendant intended to bring suit against the petitioner, and avers that by an amended complaint in the action instituted by the

defendant against the Montana Ore Purchasing Company and F. Augustus Heinze, referred to in the petition, the petitioner had been made a party defendant, and an application for an injunction has been made and a restraining order issued. The defendant, while admitting that a friendly feeling existed between the companies named as co-conspirators with it, and that the Heinzes and the Montana Ore Purchasing Company are the common enemies of these corporations, denied all allegations of fraud, conspiracy, and bad faith. The allegations concerning the business of the Montana Ore Purchasing Company and the Johnstown Mining Company and the relation of the petitioner and the Heinzes to them were admitted, as was also the allegation concerning the pendency of a large number of suits between them and the Boston & Montana and the Butte & Boston Companies. The organization of the Amalgamated Copper Company was admitted, and that Daly, Rodgers, and Rockefeller are interested in it was likewise admitted. Admission was made that the Nipper vein enters into the Oden lode mining claim on its dip and passes into it on its strike, and that the Washoe Company had obtained an injunction and that the action had not been tried; also that the Anaconda Copper Company was prosecuting some work within the Nipper claim. The present price of copper as averred in the petition was admitted. The existence of the hoisting plant and machinery on the Nipper, and that men are employed in carrying on mining operations thereon were admitted. The other allegations of the petition were denied. A replication was filed. It is not necessary further to set forth the pleadings on the application for the appointment of a receiver, as the foregoing synopsis contains all that is necessary to be stated in order that the positions of the respective parties may be understood. After a hearing the court made the order appealed from.

1. The fundamental, or, at least, the principal, issue presented by the pleadings in the action wherein the receiver was appointed is whether the legal title to the vein in controversy

is in the plaintiffs or in the defendant,—that is to say, the right to the relief by the remedy of injunction must under the pleadings depend upon the establishment of the legal title. Each party asserts the legal title as the basis of his cause of action or defense. Counsel for the defendant argue that since the asserted rights of the parties rest upon alleged legal, as distinguished from equitable, titles, a receiver ought not to have been appointed, whatever showing of merit the application may otherwise have had,—this upon the theory that where the principal question is as to a legal right or title, chancery is without jurisdiction to appoint a receiver, no matter what equity may be disclosed. Whether or not the position of the defendant be correct we need not decide upon this appeal, preferring to reserve the question and to dispose of the case upon other grounds. For the same reasons we reserve the questions whether or not the motion and the demurrer addressed to the petition were well interposed, and the question whether the assignments of the leases under which the petitioner asserts his rights were proved by the best evidence. We are inclined to the opinion that the petition for the appointment of the receiver is lacking in substance, but not being satisfied of its insufficiency, we do not pass upon that question.

2. We do not pause to consider what would have been the duty of the court below had the allegations of the petition been proved or substantial evidence adduced tending to prove them. In making the order appealed from the court below erred. Succinctly stated the alleged facts upon which it is sought to obtain the appointment of a receiver are these: The action was brought to obtain an injunction restraining the defendant from committing continuing trespasses upon the Nipper lode claim. At the time the action was commenced and also when the petition was filed, the petitioner—one of the plaintiffs—was in possession of the property the title to which is in dispute. Whatever right he has to the property arises from the terms of the lease expiring on July 12, 1901. The defendant intends presently to bring an action against the petitioner in which it

will seek to restrain him from mining the vein in controversy; in support of its application for an injunction it will procure witnesses wrongfully, falsely, and fraudulently to testify that, in their opinion, the vein has its apex for a part of its length in the Little Mina lode claim, owned by the defendant, and that the vein passes upon its dip into the Nipper lode claim. By such character of evidence it will likely succeed in deceiving the district court of Silver Bow county, where the present action is pending, and procure from that court, or one of its judges, an injunction. The defendant knows the apex is not within the Little Mina lode claim and will seek to obtain the injunction in bad faith for the purpose of harassing the petitioner and his associates and destroying their business,—all of which will be done in pursuance of an unlawful conspiracy entered into by the defendant and others with the view of accomplishing that end. The petitioner's lease will expire on July 12, 1901, and if defendant succeeds in obtaining an interlocutory injunction the lease will be valueless to the petitioner, unless a receiver be appointed, for the reason that a final trial upon the merits cannot be had until after his right to mine will have ceased. Unless a receiver be appointed during the lifetime of the lease the petitioner will lose at least $6,000 a day, the profits he would make if not enjoined. In case he is enjoined his only remedy would be an action upon such bond as the court might require upon the granting of an injunction, which bond would be inadequate for his protection and difficulty would be experienced of estimating and proving the amount of the damages he would suffer. The present price of copper is 16 cents a pound, being 5 cents more than copper has sold for during some years prior to 1899, and there is a likelihood that the price will decline and perhaps next year will fall to 11 cents or less.

The allegations concerning the existence of an unlawful conspiracy are without substantial support in the evidence. For the like reason the charge that the defendant would support its application for an injunction against the petitioner by false

and fraudulent testimony must be disregarded. Neither does the evidence tend to prove that the defendant knows the apex is not within the Little Mina lode claim,—on the contrary, there was evidence tending to establish the existence of the apex within that claim. These allegations must therefore be disregarded. Having eliminated these, what were the facts which the district court considered sufficient to warrant the appointment of a receiver to work the vein in controversy? The plaintiffs, including the petitioner, had by an interlocutory injunction restrained the defendant from mining the vein; the defendant then sued the plaintiffs and obtained a restraining order against them. The petitioner was in possession under a lease which will expire on July 12th next. Except for the restraining order he would be able to operate the property at a profit of not less than $6,000 a day so long as copper is selling at the present price. The bond or undertaking required which will be required of the defendant on the granting of the restraining order or injunction will not afford the petitioner adequate protection, and the damages he will suffer by reason of such injunction will be difficult of ascertainment and proof. With respect to the bond or undertaking, suffice it to say that presumptively the court below, or its judge, required and will require when the occasion demands, of the defendant a bond or undertaking sufficient in all respects to protect the petitioner from any loss occasioned by the injunction. The assertion that, in the event the vein should remain unworked during the term of the lease and it should ultimately be determined that the petitioner had been entitled to mine, difficulty would be experienced in ascertaining and proving the amount of damages suffered by the petitioner on account of his inability, in consequence of the injunction, to work the property under his lease, may likewise be disregarded, for it is hardly necessary to observe that equity will not appoint a receiver because the amount of damages for the injury which may be caused by an injunction is difficult of ascertainment and proof.

Unless the case falls within the provisions of Subdivision

6 of Section 950 of the Code of Civil Procedure, the receiver should not have been appointed. By that subdivision courts may appoint receivers in all cases "where receivers have heretofore been appointed by the usages of courts of equity." Has it been the usage to appoint receivers in a case like the one at bar? Is there any principle or doctrine in equity which justifies the appointment? Argument would seem needless, for it is plain that these two questions must be answered in the negative. The power to appoint a receiver is to be exercised sparingly and not as of course. A strong showing should be made, and even then the authority must be exercised with conservatism and caution. "The object of the exercise of the summary and extraordinary remedy of appointing a receiver is primarily to protect the subject-matter of the controversy from removal, waste or injury during the progress of the action, and to preserve it intact for final disposition by the court according to the rights and priorities of the parties entitled. It is particularly serviceable when there is danger that the subject-matter may be wasted or destroyed, impaired, injured or removed during the progress of the suit. The object is to secure the fund for the party found, upon final hearing to be entitled, and to produce as little prejudice as possible to any of those concerned. When one party has a clear right to the possession of property, and when the dispute is as to the title only, the court is always slow to disturb the possession. Being a power which practically deprives the rightful owners, as well as unlawful claimants, of the possession of property, and it being necessary to its usefulness and value as a remedy that it be exercised in a peremptory way and without a full and final hearing upon the merits, it is to be resorted to with unusual caution, and only for preventing 'manifest wrong imminently impending,' or where the case clearly shows that the complaining party would be in danger of suffering irreparable loss if it were refused." (Beach on Receivers, Sec. 47.) For a court to seize the *corpus* of the property before a decision adjudging the title to be in one of the parties and intrust it to a receiver, however honest and

capable he may be, to await the final determination of the suit, is often in effect the levy of an execution *in limine;* and especially is this true when the receiver is commanded to remove from the property that which constitutes its value. No matter how erroneous such an order may be, if the court had jurisdiction to make the appointment, the property is liable for the debts incurred by the receiver. The party in whom the title is ultimately declared may have decided to permit his property to remain unworked, or he may have decided to mine it in a particular fashion; the receiver is not his agent but the arm of the court over which he can have no control. In the case at bar the petitioner was in possession. The injunction, if continued in force, would preserve the property until the rights of the parties could be decided. To appoint a receiver, in an action for an injunction against trespasses, with power to take away the very substance of the estate, on the ground that the defendant will enjoin or has enjoined the plaintiff in possession from extracting ore from the property, accords neither with the usages nor principles of courts of equity. Except in North Carolina (*Deep River Gold Mining Co.* v. *Fox*, 4 Iredell's Equity 61, 1 Morrison's Mining Reports 296; *Parker* v. *Parker,* 82 North Carolina 165; *Thomas* v. *Nantahala Marble & Talc Co.,* 7 C. C. A. 330, 58 Federal Reporter 485) where the courts seem to base their decisions upon the uncertain, unstable, and dangerous ground of "public policy,"—sometimes a solid foundation, but not infrequently a judicial quicksand,—the prime purpose of a receivership is to take the property from the possession of one of the parties at the instance of the other (or to take it when not in the possession of either) and hold it in the custody of the law for preservation and protection pending the suit. The party in possession and asserting title may not of his own volition yield or surrender the possession to the court for operation by it of the property despite the objection of the party asserting title thereto. There may be exceptions to this rule, but the case before us is not one of them. The case of *Nevada Sierra Oil Company* v. *Home Oil Company* (C. C.)

98 Federal Reporter, 673, does not conflict with the view which we have expressed, for in that case a receiver was appointed to perform the annual work required by the statutes of the United States upon an unpatented mining claim, to the end that the possessory title be preserved for the benefit of the party who should ultimately be adjudged entitled to it; in that case it was held also that an injunction ought not to issue for the reason that if issued the result would necessarily be the draining of a large part of the oil from the land in controversy by those operating the adjoining territory. Nor is *Elk Fork Oil and Gas Company* v. *Foster,* 99 Federal Reporter, 495, in point. There, as here, the title was in dispute; but all parties admitted the necessity of operating the property containing oil and gas wells; unless a receiver was appointed to take charge and operate the property, the oil and gas would escape and be lost; whereas in the case at bar the ores would remain in the bowels of the earth without change in character or diminution in value during the pendency of the litigation. *Bigbee* v. *Summerour,* 101 Georgia, 201, 28 South Eastern Reporter, 642, is in many respects similar to the present case. There the plaintiff sought an injunction to restrain the defendant from the commission of a trespass by mining for gold upon a parcel of land of which the defendant was in possession and asserting his right to extract the gold therefrom under a lease or license from the plaintiff. The court granted a temporary restraining order against the defendant, who then procured the appointment of a receiver to work the mine, stope out the levels already run, beat out the gold and hold the proceeds. The court said: "The right to work this particular mine was the real subject of the litigation. If the plaintiff had given to the defendant no license to mine in the shaft upon his land, then the right did not exist in him, and the plaintiff was entitled to have his property remain as it was at the time defendants were enjoined; and to deprive him of this substantial right might have resulted in great damage to him. Courts are not at liberty through receivers to seize the property of solvent

persons, who have substantial rights which they are seeking to enforce through judicial instrumentality. A receiver should be appointed only in cases of extreme necessity, and then only when his appointment is necessary to the preservation of the thing or right in controversy. Courts may not determine *in limine,* upon an application for the appointment of a receiver, the question of possession as between adverse claimants, and should move with extreme caution when they are invited by one of the parties to embark property seized by them through their receivers in industrial enterprises, and expose it to the hazard incident to the conduct of such a business. The circumstances of the present case well illustrate the doctrine which we would here inculcate. The court seized this property, directed the receiver to go into the mining business,—confessedly one of the most hazardous in which any man can engage. Suppose, as the result of his operations, he had demonstrated that there was little gold in the mine, except such as had already been taken out, and had fallen far short of realizing a sufficient fund to defray the expenses of the business venture; what would have been the position of the plaintiff, who, in the first instance, appealed to the court for his protection? His mine would have been destroyed. He would have been liable to be taxed the costs of the receivership, with the probability of having the expense of this business experiment shared by an insolvent adversary. We do not mean to intimate that cases may not arise in which, in the exercise of a wise discretion, a circuit judge would be authorized to appoint a receiver, and direct him to continue the conduct of a business in which the defendant was engaged at the time his property was seized; but we do mean to say that such a course can only be justified when it is absolutely necessary to the preservation of the rights of the parties, it being borne in mind that preservation of the property is the purpose for which a receiver is primarily appointed, and that a judicial administration through him of an estate seized by the court, though the final, is nevertheless, a secondary consideration. Necessarily these matters are largely within the discretion of

the trial judge, but at last it becomes a question of law whether the court can lawfully embark property seized by it in an industrial enterprise; and the exercise of this power depends upon how far such conduct may be fairly necessary to the preservation of the existing status, taking into consideration the character of the property, the uses to which it may be applied, and how far and to what extent use may be necessary to its preservation. So far as we are enabled to do so by judicial utterance, we are disposed to discourage the practice, at the present day too prevalent in the chancery courts, of undertaking to employ the judicial machinery in the conduct of commercial and manufacturing enterprises, the control of which should be more properly committed to private hands." These observations, as well as the doctrine announced, we approve.

So far as the receivership is concerned the petitioner occupies no better position than the owner of the fee. As lessee he was no more entitled to have a receiver appointed than was the owner. His estate is one for years, carved out of the freehold. If the owner of the greater estate was not entitled to have a receiver appointed—and in the circumstances disclosed by the record he certainly was not—the tenant for years was not so entitled. No sound reason is suggested why the petitioner ought to be declared to have rights touching the appointment of a receiver when, upon practically the same ultimate facts, his landlord would not have them. To hold that the tenant possesses such rights would be to decide that, although the owner of a mining claim in possession of the vein therein the title to which is in controversy, could not procure the appointment of a receiver, he might lease it for a period of time expiring prior to the day on which a final trial of the issue could be had, and thereby enable the lessee to obtain for himself, or for the owner, the relief which equity would refuse to the owner of the fee were he himself applying for a receiver. Such a distinction between the right of the owner and the right of the lessee does not exist.

In this opinion we have merely outlined the grounds upon

which the order must be reversed. Press of other matters and the desire as promptly as may be to remedy as far as we can the error committed prevent us from elaborating our views.

The order appointing a receiver is reversed and the cause is remanded. The *remittitur* will issue forthwith.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE MILBURN: I concur. I do not consider that it was necessary to do more than to determine that the pleadings fail to disclose a case where receivers have been heretofore appointed by the usages of courts of equity. (Subsection 6, Sec. 950, of the Code of Civil Procedure.) In my opinion, no such case is revealed to us by the pleadings.

MALONEY ET AL., RESPONDENTS, *v.* KING ET AL., APPELLANTS.

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(No. 1,584.)

(Submitted February 5, 1901. Decided April 1, 1901.)

Appeal—Specified Errors—Waiver—Mines—Adjoining Mining Claims—Extralateral Rights—Presumption—Injunction—Practice—Burden of Proof—Evidence—Discretion.

1. Where errors specified were not argued or referred to in the brief on appeal, they are waived.
2. Where, during the examination of a witness for defendants on an application for an injunction, the judge remarked that an injunction *pendente lite* would be granted on the evidence then before the court, such action does not constitute reversible error, he having heard the whole case before finally deciding that such injunction should issue.
3. Unless it clearly appears from a consideration of all the evidence that the court *a quo* abused its discretion in granting an injunction *ad litem* its order must, on appeal, be affirmed.
4. In action by the owners of a mining claim to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by under-

ground workings on plaintiffs' claim, the burden was on defendants to show that the vein they were mining in plaintiffs' claim had its apex in their claim.

5. Where, in an action by the owners of a mining claim to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by underground workings on plaintiffs' claim, there was much evidence that the apex of the vein was in defendants' claim, but there was some evidence to the contrary, and the development had not progressed far enough to identify the vein in defendants' claim with that in plaintiffs' claim, nor to show with certainty the location of the apex of the vein in controversy. *Held,* that though on paper the case made by the plaintiffs may not appear to be strong, yet the Supreme Court on appeal would not declare that the lower court had abused its discretion in granting a temporary injunction on such evidence.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by James E. Maloney and others against Silas F. King and Wakeman Sutton, impleaded with Marcus Daly and others. From an order granting an interlocutory injunction, defendants King and Sutton appeal. Affirmed.

Messrs. McBride & McBride and *Mr. E. N. Harwood,* for Appellants.

Messrs. McHatton & Cotter, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This is an appeal by the defendants King and Sutton from an order granting an interlocutory injunction.

The Plymouth lode mining claim is owned by the plaintiffs. Title to the Silver King lode mining claim is in the defendants Daly, Murray, and King. The Plymouth adjoins the Silver King on the south. The plaintiffs commenced an action against the defendants by which they seek to recover a judgment for $150,000, the value of ores alleged to have been mined, extracted and converted by the defendants from the Plymouth claim, and to obtain an injunction restraining them from entering upon that part of the Plymouth which lies west of a vertical plane passing through a point on the north side line of the

claim 405 feet distant from the northeast corner of the claim, the plane extending south seven degrees west across and vertically downward through the Plymouth claim; and from mining, carrying away, or converting to their own use the ores and minerals therein. The defendants deny that they have entered into the Plymouth claim, or have mined, carried away or converted any minerals or ores therefrom, and aver that the defendants Daly, Murray and King are the owners of the Silver King claim in which there is a vein the apex whereof is wholly within the exterior boundaries of the claim; that the end lines are parallel; that the defendants followed the lead upon its dip to the southward and within the vertical planes of the end lines of the Silver King claim continued in their own direction; that these acts of the defendants constitute the alleged acts of trespass of which the plaintiffs complain; that the defendants are the owners of the vein throughout its entire depth between the vertical planes of the end lines of the Silver King claim extended downward and continued in their own direction, —in other words, the defendants aver that they possess extra-lateral rights as against the plaintiffs. An order was issued to show cause why an interlocutory injunction should not be granted. After a hearing, the court, on the 31st day of May, 1900, granted an injunction order as prayed for, and from that order the present appeal has been taken.

The specifications of error are seven in number, but the only one which is argued or elsewhere referred to in the brief relates to the question whether the evidence was sufficient to justify the making of the order; the other supposed errors, although specified, must therefore be deemed to have been waived. They will not be considered.

The contention of the plaintiffs is, in substance, that the vein on which the defendants were mining in the Plymouth has its apex in that claim, and that if the apex is in the Silver King the vein on its strike crosses both side lines of the last-named claim, in which event—the side lines becoming the end lines—the right to follow the vein on the dip is limited to an area

bounded by the vertical planes of the side end lines projected in their own direction. The chief contention of the plaintiffs is that the vein in the Plymouth claim on which the defendants were working is a different vein from the one which the defendants insist has its apex in the Silver King claim. The defendants contend, on the other hand, that in mining the vein within the surface boundaries of the Plymouth they have followed on its dip a vein apexing in the Silver King.

During the examination of a witness for the defendants the judge presiding remarked that an injunction *pendente lite* would be granted upon the evidence which was then before the court, saying, among other things, to counsel for the defendants: "But, if you want to get evidence here to appeal or to have it reviewed, you can do so, but I shall issue the injunction on the testimony that has been given here, for the reason, as I tell you, that I have been doing it in all of these cases, and it is my duty to do it. The supreme court has affirmed these decisions." The defendants were then permitted to introduce their evidence. Judges should endeavor to avoid reaching or announcing conclusions in contested cases before hearing both parties. This is obvious. The course pursued by the judge below was extraordinary, for without hearing what further evidence the defendants might desire and be able to present, he announced his intention to grant the order prayed for. He could not judicially know whether the injunction order ought to be granted until the evidence of the defendants as well as that of the plaintiffs had been heard by him. This is also manifest. The court, however, heard all the evidence offered by the defendants and, as must be presumed, considered it. The fact that the judge prematurely or in advance announced his intention to exercise his legal discretion in a particular way upon evidence, to him seemingly sufficient, then before the court, does not constitute reversible error when he or the court (as the case may be) hears the whole case and then decides. In the absence of a showing to the contrary the presumption must be indulged that the evidence was not rejected but was con-

sidered and had its due weight. Although the judge remarked, before the close of the evidence, that an injunction *ad litem* would be granted, the order of the court may nevertheless have been correct. Unless it clearly appears from a consideration of all the evidence that the court *a quo* abused its discretion in making it, the order appealed from must be affirmed. There was evidence tending to prove that the defendants through underground workings from the Silver King claim had entered into the Plymouth claim, had mined therein, had removed ore therefrom, and were threatening the continuance of such acts. The plaintiffs are the owners of the Plymouth, and as such they are, *prima facie,* entitled to everything beneath the surface of their claim; they may assert this *prima facie* title to prevent intrusion by those who do not show that they possess the right to enter. (*Parrot Silver & Copper Co.* v. *Heinze,* 25 Mont. 139, 64 Pac. 326.) In the present case as soon as it was proved or admitted that the plaintiffs owned the Plymouth claim and that the defendants were mining within the vertical planes of its surface boundaries and removing ore therefrom, and intended to continue doing so, the necessity arose for the defendants, if they would rebut or weaken the presumption arising from plaintiffs' ownership, to show, or introduce evidence from which it might be inferred, that they were proceeding by virtue of some right which they had, and to that extent at least the burden was upon them to adduce evidence tending to prove that the vein which they were mining within the vertical bounding planes of the Plymouth claim has its apex in the Silver King claim,—on the final trial, however, the burden would doubtless be upon the defendants to establish by the preponderance of the evidence that the apex is in their claim. Having entered within the boundary lines of plaintiffs' mining claim the defendants were, *prima facie,* trespassers. Although there was much evidence tending to show that the apex of the vein is in the Silver King claim, there was some evidence tending to prove the contrary. While we do not decide that the evidence in behalf of the plaintiffs would be sufficient to support a per-

petual injunction granted after a trial of the case upon its merits, we are of the opinion that, under the circumstances, the evidence was enough, for aught that the printed record discloses, to authorize the district court in its discretion to grant an injunction order *pendente lite,* even if the contention of the defendants that certain affidavits were without probative force or weight be conceded. From testimony which the court presumably believed it seems that at the time the hearing on the order to show cause took place the development had not progressed far enough to demonstrate the identity of the vein in the Silver King with the vein in the Plymouth, nor to show with certainty the location of the apex of the vein in controversy. It may not be held by this Court that the evidence upon which an inferior court granted a temporary injunction against the mining and removal of ores or valuable mineral deposits was insufficient with respect to proof of title, unless it appear that the party obtaining the injunction has failed to establish a reasonable ground for the assertion of title by him. (*Boyd* v. *Desrozier,* 20 Mont. 444, 52 Pac. 53; *Parrot Silver & Copper Co.* v. *Heinze, supra,* and cases cited.) Repeated perusals and careful consideration of the evidence as certified satisfies us that we should not declare the lower court to have abused its discretion in granting a temporary injunction, even though, on paper, the case made by the plaintiffs may not impress us as being strong.

Let the order be affirmed. *Remittitur* forthwith.

Affirmed.

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FREEMAN, APPELLANT, v. SAND COULEE COAL COMPANY, RESPONDENT.

(No. 1,285.)

(Submitted March 18, 1901. Decided April 1, 1901.)

Master and Servant—Injury in a Mine—Concurring Causes—Failure to Provide Safe Place to Work—Directed Verdict.

1. A complaint alleged that plaintiff was injured by the fall of rock from the roof of a mine, and that defendant failed to furnish a reasonably safe place for plaintiff to work, and negligently allowed the roof of the mine to remain in an unsafe condition, and failed to properly brace it, and that it was liable to cave in unless properly supported. There was evidence that the roof of the mine was in a loose and dangerous condition, but the fall of slate was immediately caused by the attempt of a mining engineer to remove a small portion of the slate in fixing a plug for a sight. *Held,* that it was error to limit plaintiff's right of recovery to a showing that the roof fell from its own weight, and not in connection with any other cause.
2. Where an injury is the result of two concurring causes, the party responsible for one of them is not exempt because the person who is responsible for the other may be equally culpable.
8. The truth of plaintiff's evidence is to be assumed, and it is to be regarded in the most favorable light on a motion to direct a verdict for defendant.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Emel Freeman against the Sand Coulee Coal Company. From a judgment in favor of the defendant and an order denying a motion for new trial, plaintiff appeals. Reversed.

Mr. A. C. Gormley and *Mr. H. S. Greene,* for Appellant.

Mr. A. J. Shores and *Mr. I. Parker Veazey,* for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

In this cause plaintiff appeals from an order overruling his motion for a new trial, the jury having found a verdict for the defendant.

The action was for damages for injuries resulting to plaintiff from the falling of material from the roof of a coal mine belonging to defendant, in which plaintiff was, on December 31, 1895, employed as a loader of cars. The complaint sets out that in performing his work as such loader it was necessary to enter one of the main entries or tunnels from which the butt entry in which plaintiff was then working opened, and to move cars from such main entry into this butt entry to be loaded by plaintiff; "that the defendant did then and there, and long prior thereto, neglect its said duty toward this plaintiff, and did then and there expose the said plaintiff to unnecessary hazard and peril, which it might and ought in the exercise of reasonable care have guarded against, in this: that the defendant, then well knowing, or by the exercise of reasonable care could or might have known, the roof of said main entry where said cars were then standing as aforesaid, to be unsafe, and liable to fall or cave in, did wholly fail to keep safe or reasonably safe the place where said plaintiff was at work and in the discharge of his duties, and did fail and neglect to properly or at all brace or prop up the roof of the said main entry, tunnel or hallway wherein it was the duty of said plaintiff to be to remove said cars in the discharge of his duties as such servant, but said defendant did suffer the said roof of said main entry, tunnel or hallway then and there where said plaintiff was required to be in the discharge of his duties, and where said cars were then standing as aforesaid, to be and remain in an unsafe condition, and liable to fall or cave in, all of which was unknown to plaintiff, and all of which was known to the defendant, or by the exercise of reasonable care could have been known by said defendant;" "that the said defendant so negligently conducted itself that through and by reason of its negligence and want of or the exercise of reasonable care, on its part aforesaid, in failing to keep the said place safe, or to brace up or prop the said roof, while said plaintiff was in the said employ of said defendant, and in the exercise of proper care in the discharge of his duties in loading and removing said cars from the said

main entry, tunnel or hallway, the said roof of said main entry, tunnel or hallway composed of rock, earth and other deposits, then and there loose and liable to cave in (unless the same was propped or braced as aforesaid), did then and there cave in and fall upon this plaintiff, crushing, wounding, bruising and injuring him about the face, head, body, and crushing, mangling and breaking his right leg near the ankle, and injuring and bruising said ankle, whereby he was made sick, sore, disabled and forever lame, and whereby the use of his said right leg, ankle and foot was partially destroyed, so that he has from that day to this been, and will forever remain, lame and disabled from doing manual or other labor as a miner or otherwise,—all to his damage in the sum of five thousand dollars."

The defendant admits its incorporation and business, and that at the time of the injury the plaintiff was in the employ of the defendant as a loader of cars; that he was injured by the fall of material from the roof of the mine; and that one of the bones in his right leg was thereby broken; it denies all other allegations of the complaint. The defendant alleges that at the time of the injury the plaintiff was not engaged in the discharge of his duties, but was in a portion of the mine where, at such times, he had no right to be, and that he received his injuries by reason of his negligence.

Much of the testimony as to matters covered by the instructions of the court which are assigned as erroneous was given in connection with a map of the place in the mine where the accident happened, but the map is not in the record before this Court, and it therefore is not easy to fully comprehend all the circumstances. It appears from the evidence that at the moment when the material fell from the roof of the tunnel upon plaintiff, an engineer and his assistant, both employees of the company, in the performance of duty, were engaged in putting plugs in the roof, to which were to be attached strings for sights to aid the engineer in his business; that the assistant found the slate in the roof where he attempted to put a plug to be in bad

condition. He says: "It was broken on the outside of it,—on the outside down; in the inside of was the same way. Right at that particular point, where the sights was wanted to go, there was a piece of slate that, well, to my judgment, was not sufficiently solid to put those plugs in. If I put them in there, certainly it would have to be done over again in a few days, or before it was time to extend that work. I went to work to take that down. I went to work and cut this piece through between those pieces that were broken out, to take that piece out to make it so I could get a solid piece of roof to put the points in. I cut it through the one side with a pick. On the other side,—well, I will show you. Running along here, this end is cut and fell out. I cut this narrow point through in order to get a piece out in the middle to put that up. I cut the slate in two by a pick about eighteen inches to two feet from the left rib going into the mine. About, I should judge, from my recollection now, the piece of slate I cut in two with the pick was about four feet, extending in at that point. Just as I got that cut through I gave a little pry on it, and came a little bit, and swung, and was held there by a prop. I knocked the prop out, and the whole thing came down. That was the time that Freeman was struck by the rock. I have seen Freeman before, about three or four minutes before I knocked this slate down. I was about finished in the cutting. Saw him coming right out of that crosscut,—crosscut leading out of the back entry, right here; right here at the point of the crosscut, where I could see him plain. I told him to get back. They went back, or went out of my sight. I could suppose, when I lost both men, they were back right where they were. Thought they had gone back into the crosscut. Went on with my work thinking everything was safe,—nothing below the pieces of rock."

There is testimony to the effect that the plaintiff, when injured, was from 20 to 25 feet from the place where the rock was pulled down by the assistant. There is also testimony to show that the roof at the spot where the plaintiff was injured had been in bad condition, and likely to fall, for the period of

about two weeks, and that it had had for its support at least one prop put up by another workman near where plaintiff was hurt, two weeks before; that the prop near the plaintiff did not come down; that the plaintiff, when found after the accident, was in a "partly standing condition," with "the rock covering him almost up to the neck;" that the roof was composed of what is called "soft slate;" and that considerable water was dripping from the roof at the place of the accident.

The appellant assigns as error, among other things, the giving of the following instructions by the court:

"No. 1. The plaintiff in this case alleges in substance, that at the point where he was struck by falling rock the roof of the main entry consisted of rock, earth and other deposits, which were then and there loose and liable to cave in unless properly braced or supported. The defendant, the Sand Coulee Coal Company, knew, prior to the time of this accident, that the roof was in this condition, or that, if it did not know such to be the condition of the roof, it would have had such knowledge if it had exercised reasonable care. The plaintiff further charges that the defendant did not prop, brace or support the roof at this place sufficiently to prevent the same from falling of its own weight, and that its omission to so brace arose from a want of the exercise upon its part of that reasonable and ordinary care which the law requires the defendant to take for the protection of the men in its employment whose duty might call them to the entry at that place. There being no other negligence charged against the defendant in this case, it is incumbent upon the plaintiff to establish the substance of these allegations before he can become entitled to a verdict on account of the injuries received; and hence, before you can find a verdict for the plaintiff, you must be satisfied from the evidence: First, that the condition of the roof was such that it was in fact likely to fall of its own weight unless braced so as to support it; second, that the defendant knew, or ought to have known, and in the exercise of reasonable care would have learned, of such condition prior to the accident; third, that the defendant omitted to prop-

erly brace and support the roof; fourth, that the omission to properly brace and support the roof resulted from a lack of ordinary and reasonable care on the part of the defendant in keeping the place safe; and, fifth, that the fall of the rock occurred by reason of a lack of proper bracing and support, and not from some other cause."

"No. 5. If at the time of this accident the slate fell because the engineer, Burrell, or his assistant, McCliment, loosened the same while engaged in putting in the plugs for sights, then the fall was not occasioned in the manner or by the cause set forth in the complaint, and there would be such a variance between the allegations of the complaint as to the cause of the fall of rock and the proof respecting the cause of the fall as would make it impossible for the plaintiff to recover in this case, and your verdict would necessarily be for the defendant."

"No. 6. If you believe from the evidence that at the time when the plaintiff received his injuries the slate falling upon him was picked or pried from the roof by one of the persons who was engaged in putting in plugs for sights in the roof, then there would be such a variance between the evidence as to the cause of the fall of the rock and the allegations in the complaint as to the cause of the fall as would make it necessary for you to return a verdict for the defendant, since the plaintiff in this case must recover in this case, if at all, by proving that the fall of the rock was occasioned solely by lack of proper support of the roof. Whether the defendant in this action could, under a different complaint, be held liable in damages for the injury sustained by plaintiff upon the proof of the pulling down of the slate by McCliment or Burrell while engaged in putting in the plugs for sights, is a question that is not to be determined in this case, and it is not for you, in consideration of this evidence, to consider whether the defendant ought or ought not to be held liable for the injury if it arose in that way."

Instruction No. 1 was erroneous and prejudicial to the plaintiff. It misstates the allegations of the complaint, in that it tells the jury that the plaintiff charges that the defendant did

not sufficiently prop, brace or support the roof at the place where plaintiff was hurt to prevent the same from falling *of its own weight,* and further says that, before plaintiff can recover, the jury must be satisfied from the evidence that "the condition of the roof was such that it was in fact likely to fall of its own weight unless braced so as to support it." The complaint did not allege that the defendant failed to "prop," etc., "the roof * * * sufficiently to prevent the same from falling of its own weight." The complaint did not confine the danger to the possible falling of the roof "of its own weight," but charged that the defendant, knowing, etc., "did wholly fail to keep safe, or reasonably safe, the place where said plaintiff was at work," and "did fail and neglect to properly or at all brace or prop up the roof of the said main entry, tunnel or hallway wherein it was the duty of said plaintiff to be to remove said cars in the discharge of his duties as such servant, but said defendant did suffer the said roof of said main entry, tunnel or hallway then and there where said plaintiff was required to be in the discharge of his duties, and where said cars were then standing as aforesaid, to be and remain in an unsafe condition, and liable to fall or cave in;" and alleged further that said roof "then and there loose and liable to cave in (unless the same was propped and braced as aforesaid) did then and there cave in and fall upon this plaintiff, crushing, wounding," etc. These allegations are broad enough to permit evidence of concurrent causes, if one of such concurrent causes be the unsafe condition of the roof, due to neglect of the defendant, and the other the act of such helper to the engineer, who was engaged in trying to put in a plug in a roof which should, presumably, have been safe enough to have plugs put into it in the ordinary course of coal mining business, without any reasonable expectation of its falling or caving in upon a workman 20 or 25 feet distant. The complaint did not, by its terms, or by any logical inference, exclude all causes except gravity pulling down unsupported loose material. Therefore the instruction is wrong, and prejudicial to plaintiff, in saying that, before the jury can find a

verdict for plaintiff, it must find that "the condition of the roof was such that it was in fact likely to fall *of its own weight* unless braced so as to support it." Gravity might not alone have brought the material down if the assistant to the engineer had not jarred or disturbed it by attempting to prepare a place for a plug some 20 or 25 feet away.

It was for the jury to find from the evidence whether or not negligence of the defendant in leaving the roof in an unsafe condition, concurrently with the act of the assistant, caused the caving in of the roof to the injury of plaintiff; and we think that the allegations of the complaint would support a finding that negligence of the defendant was a proximate cause,—if the jury should believe the evidence sufficient to warrant them in arriving at such a conclusion.

Where an injury is the result of two concurring causes, the party responsible for one of them is not exempt because the person who is responsible for the other cause may be equally culpable. (*Lake* v. *Milliken,* 62 Me. 240, 16 Am. Rep. 456, and numerous cases cited; 1 Sutherland on Damages, p. 64, and cases cited; *Coppins* v. *N. Y. Central & Hudson River Railroad Co.,* 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 915, and other New York cases cited; 16 Am. & Eng. Enc. Law (1891) pp. 440, 441, text and notes, and cases cited.)

It was for the jury to determine whether the defendant might, from knowledge of the condition of the roof, have reasonable anticipated, or with the exercise of reasonable care and prudence might have known, that the roof was in such a condition as to give it reasonable grounds for anticipating the very consequences which did happen concurrently with the attempt to place the plugs, and it was error for the court to confine the jury to consideration of the single question whether "the condition of the roof was such that it was in fact likely to fall of its own weight unless braced so as to support it."

The above remarks apply also to instructions numbered 5 and 6, which are erroneous, and prejudicial to the plaintiff.

There is nothing in the other instructions to offset the vice of the ones criticised.

It is not necessary to consider the other errors assigned, except to say that the views expressed in this opinion will be sufficient for the guidance of the court below upon a new trial.

We cannot agree with counsel for respondent in his contention that upon the undisputed evidence a verdict should have been directed for the defendant upon the ground of failure of proof. In considering such a question we must, as frequently decided by this Court, assume the truth of the evidence tending to support plaintiff's case, and regard it in the light most favorable to him; for so the jury might have regarded it if the jurors had not been so erroneously instructed by the court as to practically prevent any consideration by them of plaintiff's case.

The order denying the motion for a new trial is reversed, and the cause remanded.

Reversed and Remanded.

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STATE EX REL. KING ET AL., RELATORS, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

(No. 1,547.)

(Submitted February 4, 1901. Decided April 1, 1901.)

Mandamus—Court's Discretion—Court Rules—Affidavits Not Served with Motion—Consideration.

1. Under a rule of court requiring that affidavits and papers to be used in support of a motion shall be served on the attorneys of the parties at the time notice of motion is served, it was not error for the court to refuse to consider affidavits of the moving party served two days after the notice and three days before the hearing of a motion, such affidavits not referring to matters coming to the attention of the movants after notice was served.
2. Reasonable rules of the district courts, when made and published, are part of the law of the land so far as procedure in such courts is concerned, and so far as the Supreme Court is concerned in passing upon the action of such courts in relation thereto.
3. *Mandamus* will not apply to a judicial act to correct an error.

4. ***Mandamus*** **will not lie to compel the court to hear a motion for dissolution of an injunction, where the court had dismissed the motion after having its attention called to the pleadings, orders and records in other cases between the same parties, and having determined that the same question had been decided, though the evidence on which its determination was based was unsatisfactory, since *mandamus* cannot be used to control the discretion of an inferior court acting within the scope of its authority.**

APPLICATION by the state of Montana, on the relation of Silas F. King and others, for *mandamus* against the Second judicial district court and the judges thereof. Application denied.

Mr. E. N. Harwood and *Messrs. McBride & McBride,* for Relators.

It is sufficient answer to the first subdivision of plaintiff's objection, to call the attention of the Court to the fact that the rule which is referred to in said subdivision does not provide a penalty for a failure to serve and file the affidavits with motion. The construction of the rule which would preclude relators from a hearing because one day intervened between the service and filing of their motion and the service and filing of their affidavits, would be very unreasonable. There is nothing in the second subdivision of plaintiff's objection, which is to the effect that the temporary injunction which relators seek to dissolve was "granted after notice." The court's power over its process is not abridged by the fact that it was "granted after notice." By virtue of the constitutional provision creating courts of equity in the state of Montana, they have inherent power to control the process of the court. The district court shall have original jurisdiction in all cases of law and equity. (Constitution, Sec 11, Art. VII.) The power to isssue an injunction implies a power to dissolve it, and a court which has issued a preliminary injunction has inherent power to suspend, dissolve or modify it upon attention being called to the impropriety of the order. (Ency. of Pl. & Pr., Vol. 10, page 1027.) Courts of equity have ample power to control the processes of the court, and the use which Maloney *et al.*,

or any other person, may make of such process. (*Van Zandt* v. *Mining Co.*, 48 Fed. 770.)

The third subdivision of plaintiff's objection is not tenable. Relators' motion stated facts sufficient to warrant the court in hearing the same. The sole object of a temporary injunction in cases of this kind is to preserve the subject of controversy, pending the trial of the case upon its merits. (1 High, Injunctions, Secs. 4 to 15; *Bluebird Min. Co.* v. *Murray,* 9 Mont. 468-476; 10 Ency. Pl. & Pr. 878, and cases cited; *Helm* v. *Gilroy,* 26 Pac. 851.) It is a gross abuse of the process of the court for a party to disregard his own injunction, after having, by means thereof, tied the hands of his adversary. (*Van Zandt v. Mining Co.,* 48 Fed. 770; *Haight* v. *Lucia* 36 Wis. 355, 361; *Mowrer* v. *State,* 107 Ind. 539, 543, 8 N. E. 561; 10 Am. & Eng. Ency. Pl. & Prac. 1104; *Silver Peak Mines* v. *Hanchett,* 93 Fed. 76-77.) When a district judge refuses to perform the functions of his office, *mandamus* will lie to compel performance. (Code of Civil Procedure, Sec. 1961.)

Mr. C. P. Drennan and *Messrs. McHatton & Cotter,* for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This cause is before this Court upon the petition of the relators for a peremptory writ of *mandamus,* and upon the motion of defendants to quash the alternative writ and to dismiss the action with costs. The motion to quash and the matter of the petition were argued and submitted at the same time. The relators interposed a motion to strike certain parts of the answer and return of the defendants. This motion was not argued by counsel, and it is not necessary to consider the same in this opinion, except to say that in arriving at a determination the parts objected to have not been taken into consideration.

In cause numbered 8,059 in the court below, wherein Maloney *et al.* were defendants, commenced in July, 1899, in Department II of the district court of Silver Bow county, the court granted an injunction *pendente lite* enjoining the defendants from working certain mining property claimed by plaintiffs as their property, and underlying the surface of the Plymouth lode claim.

On April 24, 1900, relators served and filed in said suit a motion to dissolve the injunction, setting out as grounds for said motion "that Maloney *et al.* had abused, and were in the act of abusing, the process of the court, in that they had been, since the issuance of said injunction order, and were then engaged in the commission of acts going to the destruction of the estate, which the order they had procured was intended to preserve." This motion came on for hearing before the district court in Department II on May 7, 1900, when Maloney *et al.* objected to the hearing of the same on the following grounds:

"First. Said court should not entertain or hear said motion, because the affidavits filed in support thereof were not filed with said motion, and copies thereof were not served upon said plaintiffs or their attorneys with said notice, or at the time said notice was served upon them, as required by Rule 3 of this Court.

"Second. Because said restraining order and injunction was granted by the court after notice to the defendants, and upon the order to show cause served on them, and after a full hearing of the same.

"Third. Because at the time said restraining order and injunction was granted the same was granted upon a hearing, and after due and legal notice to the defendants, and that said defendants did not ask for or obtain, at the time or thereafter, any or leave or order of court allowing them the privilege or permitting them thereafter to apply for the dissolution or modification of said order, and the right to do so was not created or reserved in the order granting said injunction and restraining order.

"Fourth. Because defendants' motion does not state any facts or reasons which would justify the court in hearing the same, or which, if shown to exist, would authorize or justify the court in modifying or dissolving said restraining order and injunction.

"Fifth. Because the defendants' motion and the affidavits filed in support thereof are insufficient to justify or warrant the court in entering upon the hearing of said motion, or to authorize or warrant the court to modify or dissolve said injunction and restraining order; and because, if the court should grant said motion, its order granting the same would be an abuse of judicial discretion, and would result in irreparable injury and damage to plaintiffs.

"Sixth. Because the defendants herein heretofore presented and had heard by this court their motion to dissolve said restraining order and injunction, and the court, after a full hearing of the same, made and entered its order refusing to dissolve the same, and the defendants have never obtained any leave to renew the said application, or to again move the court for the dissolution of said restraining order.

"Seventh. Because said motion and the affidavits filed in support thereof are sham, and show upon their faces that the matters and things therein stated and attempted to be charged are immaterial and insufficient to justify the court in entertaining said motion, or in entering upon a hearing of the same, or in making any order with reference to said injunction order. And because since the granting of said injunction order the defendants brought an action in Department No. 1 of this court against the plaintiffs, and applied to the Honorable John Lindsay, judge of said department, for an injunction against these plaintiffs to restrain and enjoin them from doing any of the acts or things mentioned in the complaint in said action, and that in said complaint the matters set forth in the affidavits and motions filed herein are stated; and that said matter came on before said court, the Honorable John Lindsay presiding, upon the application of these plaintiffs therein to dissolve the

restraining order theretofore issued in said action against them, and for an order of the court refusing the application of the plaintiffs therein for an injunction; and that the various matters complained of in the motion herein and stated in the affidavits filed in support thereof were presented at said time by the plaintiffs in said action; and that said court, through said judge, after a hearing upon the same, dissolved said restraining order issued in said action, and refused to grant the plaintiffs therein an injunction against these defendants. And because, after the granting of the injunction order herein, the defendants herein brought an action against these plaintiffs and others in this department of the court, and sought to obtain an injunction against them preventing them from breaking or removing any rock or ore or mineral, or carrying away any ores or mineral from the ground and vein in controversy herein; and a full and complete hearing was had therein upon the testimony and evidence submitted by the respective parties, and after said hearing the court dissolved the restraining order theretofore issued therein, and entered its order refusing to grant to the plaintiffs therein an injunction. And because, by reason of the hearing had before this court in which the restraining order herein was granted, and of the said motion in Department 1 and the hearing had therein before the Honorable John Lindsay, judge thereof, and because of the hearing had and the orders made in the action brought by the defendants against these plaintiffs above referred to, and being cause No. 8,213 of the files of this court, the matters complained of in the motion herein, and all of the things stated or attempted to be set forth in the affidavits in support thereof, have been determined by the orders of this court against the defendants, and the same are *res adjudicata.*" The court sustained the objection, and made its order dismissing the motion to dissolve the injunction.

On October 20, 1899, said King *et al.* commenced an action numbered 8,213 in the same department, against said Maloney *et al.*, praying that defendants be, among other things, en-

joined from entering or working the mining property in dispute, in which cause the court issued an order to show cause and a restraining order pending the hearing. On February 3, 1900, the court denied plaintiffs' application for an injunction *pendente lite,* and dissolved its restraining order. In this cause the complainants, King *et al.,* alleged that defendants had entered upon the disputed property, and were extracting a large quantity of valuable ore therefrom, and threatening to continue to do so. On February 15, 1900, said King *et al.* commenced in Department 1 of said district court their action numbered 8,418, against Maloney *et al.,* praying, among other things, that the defendants be enjoined from entering or working the mining property in question. The judge of the said department dismissed the said cause for want of jurisdiction, the principal reason given being that it was apparent from the pleadings that the principal cause of action stated was identical with that of suit numbered 8,213, and it and the other matters set up in said suit were such as could have been presented for adjudication in the former action by supplemental or amended pleadings; and therefore the court held it to be incumbent upon it to dismiss the cause, the other department having acquired and taken jurisdiction.

In the complaint in cause No. 8,418 it is alleged that Maloney *et al.* had entered upon and were working the mining property in controversy, and were extracting valuable ores, and filling up the plaintiffs' drifts and tunnels, and destroying the workings and developments showing the identity and continuity of the vein.

Upon the hearing of May 7, 1900, of the motion to dissolve the injunction in cause No. 8,059, the court, considering the objections of the plaintiffs in said cause, made an order dismissing the motion to dissolve, recited in its minutes as follows: "This day motion to dissolve injunction comes regularly on for hearing, Esq. John J. McHatton appearing on behalf of plaintiffs, and defendants are represented by Esqs. F. T. McBride and E. N. Harwood; whereupon counsel for

plaintiffs objects to the hearing of motion to dissolve injunction for the reason that it is *res adjudicata*. Evidence is adduced upon said objection, and arguments heard, and the objection by the court sustained, and motion is thereupon by the court dismissed; to which ruling defendants duly except."

Defendants moved to quash the alternative writ. The court thereupon ordered them to answer, and issues to be made, reserving all questions presented until final hearing. At the hearing evidence was taken, and the cause submitted.

Judge Clancy,. answering, avers that upon the hearing on the objections the objectors offered the pleadings, orders and records in cases 8,059, 8,213 and 8,418, saying also: "There was also in evidence in support of said objections the testimony taken upon the hearing of said order to show cause, and the minute entries of the court showing said hearing, and the order of the court, made on February 3, 1900, overruling the application for an injunction therein and dissolving the restraining order theretofore issued in said cause." This quotation refers to cause numbered 8,213, wherein, as heretofore stated, the relators, as plaintiffs, set up that said Maloney *et al.*, defendants, were engaged in working the property in dispute, and extracting valuable ores therefrom, belonging to the plaintiffs. It appears that the court did not consider the affidavits accompanying the motion. The testimony of Mr. J. J. McHatton, counsel for the defendants herein, is somewhat in conflict with the return of the district judge, in that it declares that the testimony taken in the several causes referred to was not actually introduced, but that the attention of the judge was directed to the same, and that counsel was informed by the judge on the hearing that it was not necessary to actually produce the transcript of such evidence before him, as he would take notice of it.

We are, in effect, asked to declare that the court did not take up and consider and determine the motion; that the court's record of its order is false, and that the verified answer of the judge is also false in some particulars; to vacate the said order,

and to issue a mandate directing the court and its judge "to forthwith hear relators' said motion for the dissolution of the said injunction order issued May 5, 1899," made in said cause numbered 8,059.

It appears from the evidence submitted in this Court, from the petition and the briefs, that at the time of the hearing of the objections there was no objection to the consideration by the lower court of the question as to whether or not the motion was *res adjudicata,* as declared in the objections.

The court, under its rule, was at liberty, on the objections, to entirely disregard the proofs in the form of affidavits accompanying the motion to dissolve; and it appears that it did so, they not having been served and filed with the motion, but served and filed two days after service of notice of motion, and three days before the day noticed for hearing.

The hearing of the motion to dissolve had been continued on the court's own motion. The plaintiffs in the cause in which the motion was filed had the right to rely on the court's rule, and to invoke the same, as they did, in their objections filed on the day that said motion was noticed to be heard. Their right to have said affidavits disregarded by the court accrued on the same day, and they evidently relied upon the court's rule, and did not offer any counter affidavits. The court's rule is a reasonable and a just one, and we cannot say that the court erred in disregarding the affidavits, as they were not filed or served contemporaneously with the motion, as required by the said rule, and did not refer to matters coming to the attention of the movers after notice was served. Reasonable rules of court are by law permitted to be made and adopted, and, when made and published, are part of the law of the land, so far as procedure in the court where they are made and published is concerned, and so far as this court is concerned in passing upon the action of such courts in relation thereto. In this connection we pause to say that we disapprove of the decision of the Supreme Court in the case of *Stevenson* v. *Cadwell,* 14 Montana 313, 36 Pac. 185, as we do not believe that it is

error to apply rules of court if their application has been invoked by parties to an action who had a right to invoke the same.

The contention of the relators is that the court below erred in finding that the matter was *res adjudicata*. They declare that the court did not have before it actually the evidence averred by the respondent judge to have been introduced, and they deny that the matter was *res adjudicata*.

"Superior tribunals may, by *mandamus*, command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error,—as where the act has been erroneously performed." (Mr. Justice Clifford, in *Ex parte Newman*, 14 Wall. 169, 20 L. Ed. 880.) If the duty is unperformed, and it be judicial in its character, the mandate will be to the judge, directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be performed. The writ must not be extended too far, or used to control the discretion of an inferior court acting within the scope of its authority. (*Ex parte Newman*, 14 Wall. 169, 20 L. Ed. 880; *Ex parte Denver & Rio Grande Ry. Co.*, 101 U. S. 711, 25 L. Ed. 875; *Ex parte Many*, 14 How. 24, 14 L. Ed. 311; *People* v. *Arapahoe Co. Dist. Ct.*, 14 Colo. 396, 24 Pac. 260; *State ex rel. Independent Pub. Co.* v. *Smith*, 23 Mont. 329, 58 Pac. 867; *State ex rel. Northern Pac. Ry. Co.* v. *Loud*, 24 Mont. 428, 62 Pac. 497; *Montana Ore Purchasing Co.* v. *Lindsay*, 25 Mont. 24, 63 Pac. 715.) We do not consider that this is a matter wherein the court has erred in the consideration of some question of law or of practice preliminary to the whole question, or any part thereof, but a simple question of whether or not the court, having taken up and considered—on perhaps insufficient evidence—the question whether or not the matter was *res adjudicata*, erred in its ruling. If it were a question simply of the court's having erred in a conclusion of law or on a question of practice, presented as a preliminary objection,

and because of such error no consideration had been given to the motion to dissolve, *mandamus* would lie (*Raleigh* v. *First Judicial Dist. Court,* 24 Mont. 306, 61 Pac. 993); but in the case at bar we are of opinion that *mandamus* is not within the power of this Court to grant.

It appears that at the time of the hearing on said objections it was admitted and understood by the court and all the parties that the property in dispute was the same property mentioned in said causes numbered 8,059, 8,213 and 8,418.

The relators, upon the hearing on said objections, and upon the question of *res adjudicata,* then considered, did not offer any testimony outside of said affidavits to which objection was made under said rule.

Did the court err in its finding that the matter was *res adjudicata?* If so, *mandamus* will not apply to a judicial act to correct an error. If evidence was considered, and on it the court acted, *mandamus* will not lie to reverse its decision, and to coerce it into finding otherwise. It is apparent from the evidence before this Court and from the answer of the district judge that the court, having had its attention directed to the pleadings, orders and records in the cases numbered 8,059, 8,213 and 8,418, and having been asked to notice the evidence in the two cases in which testimony had been taken, and to which its attention was specifically directed then and there, although the evidence was not produced before the court in the actual form of a transcript, concluded, after consideration thereof and of the subject-matter of the motion and said objections, that it had already once heard and determined the question of the alleged abuse of its injunction by the parties who had sued out the same.

We cannot, under the circumstances of this case, hold that the court has refused to consider and determine said motion. The motion was considered on the objections, although perhaps erroneously decided to be *res adjudicata,* and we cannot, by *mandamus,* order the court to set aside the objections, and to reconsider the motion, to the end that it may be forced to have more or better evidence than it did on the said hearing.

The alternative writ is quashed, and the petition for a peremptory writ is denied.

Mandamus denied.

MR. CHIEF JUSTICE BRANTLY: I concur in the result reached by Mr. Justice Milburn in the foregoing opinion, but do so on the ground that the district court was justified in refusing to hear the motion to dissolve the injunction because the relators had disregarded the rule of the district court requiring the affidavits to be filed and served with the notice of motion. Objection was made by the plaintiffs in No. 8,059 on this ground at their earliest opportunity, and the only proper course for the court to pursue under the circumstances was to enforce the rule by refusing to hear the motion on this ground. It was, therefore, unnecessary to proceed to a hearing of the evidence upon the question whether the matter presented by the motion was in fact *res adjudicata*. Without expressing an opinion as to the correctness of Mr. Justice Milburn's conclusions on this branch of the case, I do not think a consideration of the question involved at all necessary to a decision.

MR. JUSTICE PIGOTT: I concur in the conclusion announced by Mr. Justice Milburn to the effect that the alternative writ should be set aside, and judgment entered dismissing the proceeding.

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CONKLIN, APPELLANT, *v.* CULLEN, RESPONDENT.

(No. 1,657.)

ON MOTION TO STRIKE.

(Submitted April 1, 1901. Decided April 8, 1901.)

Appeal — Record — Evidence — Authentication — Stenographer's Certificate—Stipulation of Counsel.

1. Under the provisions of the Code of Civil Procedure of 1895, neither the certificate of the court stenographer, nor the stipulation of counsel can perform the office of the certificate of the judge to preserve and authenticate the evidence for the purposes of an appeal.
2. Under Code of Civil Procedure, Secs. 1736, 1196, the evidence heard at the trial is no part of the judgment roll so as to be included in the record on appeal, unless incorporated in a bill of exceptions or statement settled by the judge or referee before whom the trial takes place, hence a copy of the stenographer's report of evidence, not included in any bill of exceptions or statement settled by the judge, identified merely by the stenographer's certificate, and accompanied by a stipulation of counsel that such statement contains all the evidence, but without waiver of any right to object to the evidence as not being a part of the record, must be stricken from the record on motion, as it could only be made a part of the record under Code of Civil Procedure, Secs. 1150-1158, relating to the making of bills of exceptions, or under Secs. 1170-1176, providing the method for obtaining a new trial.

Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

ACTION by S. L. Conklin against W. E. Cullen. Judgment for defendant, and plaintiff appeals. Motion to strike part of the transcript as not part of the record. Granted.

Mr. A. I. Loeb, for Appellant.

Messrs. Cullen, Day & Cullen, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

This is an appeal from a final judgment. The transcript filed in this Court contains what appears to be a copy of the

stenographer's report of the evidence submitted at the trial. This is not included in any bill of exceptions or statement of the case settled and allowed by the judge who tried the cause. The only identification accompanying it is a certificate by the stenographer that it is a true, correct and complete transcript of his shorthand notes of all the testimony introduced at the trial, and the following stipulation by counsel: "We, the undersigned, counsel for the plaintiff and defendant, hereby stipulate that the above and foregoing record contains all of the evidence introduced in the said action, and all of the proceedings had and done therein, and is a correct transcript thereof, without waiver, however, of any right to object to the evidence as [not] being a part of said transcript and record." The respondent has submitted a motion asking that this part of the transcript be stricken out as being no part of the record on appeal. The motion must be sustained.

"On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial." (Section 1736, Code of Civil Procedure.) Subdivision 1 of Section 1196 of the same Code provides what the judgment roll shall contain in case of judgments entered on default. Under subdivision 2 of the same section it must contain: "In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, all bills of exceptions taken and filed, all orders, matters and proceedings deemed excepted to without bill of exceptions, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision."

From these provisions it is apparent that the evidence heard at the trial is no part of the judgment roll so as to be included in the record on appeal. It can be made so only under the provisions of Sections 1150 to 1158 of the Code of Civil Procedure, touching the taking and preserving of bills of exceptions, or under Sections 1170 to 1176 of the same Code, providing the method of obtaining a new trial. In either case the bill or statement is necessary to present assignments of error upon the admission or exclusion of evidence, or the question of the insufficiency or want of evidence to sustain the verdict of decision. In each case the bill or statement (as the case may be) must be settled by the judge or referee before whom the trial takes place. Without this authentication, it will be stricken out or disregarded, as forming no part of the record on appeal. (*Raymond* v. *Thexton*, 7 Mont. 299, 17 Pac. 258; *McLeod* v. *Dickenson*, 11 Mont. 438, 28 Pac. 551; *Barber* v. *Briscoe*, 8 Mont. 214, 19 Pac. 589; *State* v. *Shepphard*, 23 Mont. 323, 58 Pac. 868.) The provisions of the Code cited are substantially the same as those of the Compiled Statutes of 1887, and the rule as stated has been invariable in this state. The certificate of the stenographer cannot perform the office of the certificate of the judge (*State* v. *Shepphard, supra*); nor is there any provision of law by which counsel may stipulate that the bill of exceptions or statement of the case is correct, so as to make it a part of the record. This could be done under a provision of the old Code of Civil Procedure in case of a statement on appeal (Compiled Statutes of 1887, First Division, Sec. 436), but this provision is omitted from the present Code (*Harding* v. *McLaughlin*, 23 Mont. 334, 58 Pac. 865). Under the present Code, counsel may stipulate as to the correctness of the copies contained in the record on appeal; that is, they may substitute their stipulation for the certificate of the clerk, which would otherwise be required, that the transcript contains correct copies of the papers in the custody of the clerk. (Code of Civil Procedure, Sec. 1739.) But such stipulation may not be substituted for the certificate of the

judge, where such certificate is required to authenticate any part of the record of the trial.

There is nothing in *Emerson* v. *Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969, to support the view that the evidence in this case became a part of the judgment roll as an agreed statement of facts. In that case, as in this, there was no conflict in the evidence, and it was held that the ruling of the trial court thereon presented a question of law only, which could be reviewed on appeal from the judgment. It must not be overlooked, however, that the evidence was there made a part of the judgment roll by a bill of exceptions; though, from a careless reading of the opinion, one might conclude that this was not deemed necessary. Where there is no conflict in the evidence, there is presented a question of law, and the trial court acts upon it as upon an agreed statement of facts; but the correctness of its judgment thereon cannot be reviewed by this Court, unless the evidence is preserved and authenticated under the provisions of the Code cited *supra*. The only exception to this rule is in cases where the parties agree upon the facts, and submit them to the court for a decision, under Section 1117 of the Code of Civil Procedure. The agreed statement, then, has the force of a special verdict or finding of fact, and becomes a part of the judgment roll, under Section 1196, *supra*.

While the stipulation of counsel, quoted above, would have the effect of a certificate of the clerk as to the correctness of the transcript of the papers on file in his office, it cannot have the force of the certificate by the judge to preserve and authenticate the evidence for the purposes of an appeal.

It is therefore ordered that all that part of the transcript which purports to be a copy of the evidence submitted at the trial be stricken out.

Motion granted.

MURRAY, APPELLANT, v. HALDORN, RESPONDENT.

(No. 1,277.)

(Submitted March 1, 1901. Decided April 8, 1901.)

Counterclaim—Replication—Appeal—Assignment of Errors—Review.

1. In a suit on a note, defendant set up as a counterclaim the amount taxed by the court for his legal services on a mortgage foreclosure. Plaintiff's replication alleged that it had been agreed between them that whenever, on a foreclosure sale, plaintiff purchased the property, defendant should receive one-half of the attorney's fee as taxed by the court, and that the other half should go to the plaintiff; that plaintiff had purchased under the foreclosure in question; and that one-half of the fee allowed had been credited on the note. *Held*, that it was error to strike that part of plaintiff's replication relative to the agreement, on the ground that it was against public policy, since if the contract was immoral, and had been executed, the plaintiff had a right to show the facts in defense of the counterclaim.
2. Where, on appeal, the plaintiff contended that the evidence did not support the finding as to a sum due defendant, and the objection in the record was made as to a certain finding, which disclosed that the jury in that finding did not undertake in any way to determine the amount due defendant, the appellate court could not review the matter.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by James A. Murray against George Haldorn. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Mr. Charles O'Donnell and *Mr. E. S. Booth*, for Appellant.

Messrs. Forbis & Evans, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This is an appeal from the judgment in favor of the defendant on his counterclaim and from the order denying the motion for a new trial.

Plaintiff sued the defendant on a promissory note made by the latter to order of the plaintiff for the sum of $5,733, on which had been paid $2,000. Defendant admits all the allega-

tions of the complaint, and sets up 45 counterclaims, all in one count. The jury made certain findings, but rendered no general verdict for the defendant. The court entered judgment against the plaintiff for $5,486.30.

The appellant in his brief relies upon two assignments of error: "First, the court erred in sustaining defendant's motion to strike out portions of the plaintiff's replication; second, the court erred in overruling the defendant's [plaintiff's] two motions as set forth on page 214 of transcript." Waiving the fact that these two assignments, as they appear, are not as perspicuous as they ought to be, we find by examination of the transcript that the first assignment refers to the court's order striking out portions of the replication hereinafter referred to.

Defendant in his counterclaim alleges that "in March, 1894, the defendant performed services for the plaintiff at his request in the case of Murray v. Farlin, and was allowed by the court a fee of $1,500, which was a reasonable fee, none of which has been paid." Plaintiff, referring thereto in his replication, admits "that the defendant performed services for plaintiff in the case of Murray v. Farlin, and that he was allowed by the court a fee of $1,500, but denies that plaintiff was to pay defendant said sum of $1,500 or any or greater sum than is hereinafter set forth. Plaintiff alleges the facts to be that the said plaintiff and the said defendant, prior to the time the suit of Murray v. Farlin was commenced, entered into an agreement wherein it was agreed between plaintiff and defendant that in all cases of foreclosure of mortgages wherein the defendant was employed by plaintiff, and wherein the said plaintiff, or the party interested in the property described in the decree in the cause, purchased the property at sheriff's sale, the said defendant would only receive one-half of the attorney's fee as taxed by the court, and that the other half of the sum so taxed should go to the plaintiff or party interested in the cause; that the property described in the complaint and decree in the case of Murray v. Farlin was purchased for the plaintiff in said cause, and in pursuance of said agreement there would be due the defendant

the sum of $750, which is included in the sum indorsed on the note in plaintiff's complaint, and no other sum whatever." The court on motion struck out all of said paragraph of the replication after the words, "a fee of $1,500," leaving the paragraph to read: "Plaintiff admits that the defendant performed services for plaintiff in the case of Murray v. Farlin, and that he was allowed by the court a fee of $1,500."

Defendant in his counterclaim also alleged "that in April, 1895, the defendant performed services for the plaintiff, at his request, in the case of Murray v. Dickerman, which services were reasonably worth $500, which was allowed by the court, none of which has been paid;" and the plaintiff in reference thereto admits "that the defendant performed services for plaintiff in the case of Murray v. Dickerman, and that he was allowed by the court a fee of $500, but denies that plaintiff was to pay the defendant said sum of $500, or any other or greater sum than is hereinafter set forth. Plaintiff alleges the facts to be that the said plaintiff and the said defendant, prior to the time the suit of Murray v. Dickerman was commenced, entered into an agreement, as set forth in paragraph 32 of this answer, and that the same is made a part of this paragraph; that the property described in the complaint and decree in the case of Murray v. Dickerman was purchased for the plaintiff in said cause, and in pursuance of said agreement there would be due to the defendant the sum of $250, which is included in the sums indorsed on the note in plaintiff's complaint in this cause, and no other sum whatever." The court, in granting said motion to strike, struck out all of plaintiff's replication, in relation to the said suit of Murray v. Dickerman, after the words, "hereinafter set forth."

The action of the court in striking these parts of the replication, so complained of as error by the plaintiff, is defended by the respondent herein on the ground that the defense of the plaintiff to the counterclaim, as set up in the parts so stricken out, is "in utter disregard of all ethics," and is "immoral and against public policy," and, being "in violation of all moral

law and principle, cannot have its reward." Without undertaking to pass upon the question whether or not the defense set up by the plaintiff to the said counterclaims is immoral, it is manifest that the court erred in striking out these portions of the replication. If the alleged contract set up in the parts stricken out was void because immoral, then it was void as to all parties, including Mr. Haldorn, the defendant herein. If the contract was immoral, and had been executed, the plaintiff had a right in his replication, in defense of the counterclaim, so to allege; the complaint and the answer tending to confirm the stricken parts of the replication in the statement that $750 plus $250—$1,000—had been credited on said note before suit. If the agreement was not immoral, he certainly had a right to set up the defense which he did. In any way that the matter may be considered, he had the right to tell the facts to the court and jury. To strike out his defense was error, and for this reason the judgment must be reversed.

Examination of the record discloses that this Court cannot, in justice, reverse the case, with an option to the defendant to remit the amount which, through the error of the court in granting the motion to strike the parts of the replication, has been erroneously included in the judgment. We discover by such examination that the defendant in his counterclaim demanded $1,000 for alleged services rendered plaintiff in "assisting him in procuring from the lessees of the Estella mine the royalty on the output thereof." The testimony of the defendant in respect of said demand for $1,000 is as follows: "The next claim is No. 10, where I allege that prior to August, 1892, the defendant, at the special instance and request of the plaintiff, performed services for the plaintiff in assisting him in procuring from the lessees of the Estella mine the royalty on the output thereof, and for which I charged one thousand dollars. At that time Mr. Murray and I had become very intimate friends; too intimate, in fact. One Saturday night he was at my house, and he asked me if I would come down to his office the following day (Sunday), at 11 o'clock. He had

leased the Estella mine, which he then owned, to five Cornishmen, and he said that he had done it without any royalty being put in the contract. I think it was a verbal lease or contract, and he said that he thought if it was worked properly he could get royalty from it without any trouble. They were then shipping a great deal of very rich ore, and he told me what he wanted me to do. He wanted me to come down the next day about 11 o'clock to the side door of the bank, and he would have these Cornish boys in there, and I was to come in very hurriedly, and in an abrupt manner say, 'Well, it has got to be settled today, because I won't wait any longer.' He didn't tell me what the purpose was, but I surmised what it was, and I did it. I found the gentlemen all there. I don't know what was the result of the interview after I had gone in, but I know in a short time after that Mr. Murray and myself were going to Alaska together, and on the steamer "Queen" he showed me a bundle of checks that he said represented eighteen or twenty thousand dollars, and that that was the royalty that he had gotten from the Cornishmen out of the way he worked it on that Sunday morning. I think that Mr. Daniels, of the Summit, was one of the parties. That is all I did, and I am not a bit proud of it; but at the same time I did it, and I think I am entitled to some compensation for it. That was all I was to say; just to make that play for him that other parties wanted the property; and it was simply a bold 'bluff,'—a play to 'bluff' these men out of the royalty. I think that that kind of work should be pretty well paid for. I charged him one thousand dollars, but it remains a charge though. It never has been paid. It remains unpaid, the same as all of the other charges against him." We regret that the exception taken to the action of the court and jury in respect of this $1,000 claim is not before us in such a way that we can make any decision thereon. The specification of error in respect thereof is merely that the testimony is insufficient to support the jury's finding, giving as a reason therefor that the plaintiff had testified that the alleged services were of such a character that the defendant had not

intended to charge for the same, and the further reason that plaintiff's witness Hamilton had sworn that such services were only reasonably worth $50, the objection being made to the finding numbered 7. Inspection of this finding, as shown in the transcript, discloses that the jury in that finding did not undertake in any wise to fix the value of said alleged services. Therefore there is nothing before this Court, in proper form, in the way of an objection to the certain other finding of the jury adopted by the court in its judgment, to the effect that said alleged services were worth $1,000.

Counsel for respondent having characterized the alleged contract between plaintiff and defendant as set up in the parts of the replication stricken out as in "violation of all moral law and principle," we cannot refrain from suggesting that the district court, upon a retrial of this cause, take into consideration the question whether it, contemplating "all moral law and principle," should permit the recovery of $1,000, or any other sum, for the performance of such an act of "bluff," as shown in the testimony of the defendant, wherein he, at least, had the grace to say, "I am not a bit proud of it, but at the same time I did it;" his act being, as defendant testified, "simply a bold 'bluff,'—a play to 'bluff' these men out of the royalty."

We do not decide the other matters suggested by the appellant, as they are not presented in the brief in proper form.

Reversed and remanded.

ON MOTION FOR RE-HEARING.

(Submitted May 3, 1901. Decided May 13, 1901.)

MR. JUSTICE MILBURN delivered the opinion of the Court.

The respondent's counsel prays for a re-hearing and for ground of the prayer says that this Court in its opinion held

that, regardless of the question of morals involved, the allegations of the replication, stricken out by the lower court, should be by it heard and determined. Counsel states that this question was not raised in the briefs or argument upon final hearing, that the only question raised and argued was whether or not the alleged contract for compensation was against public policy, and that "the effect of the contract upon the right of the defendant to recover upon a *quantum meruit* * * * was not discussed, and this matter has never been presented in a formal way to this Court." Respondent's counsel in his brief, speaking of the alleged error of the district court in striking out the certain parts of the replication, uses this language: "Strangely enough, and as if in the best of faith, the plaintiff in his replication admits that the fee was allowed by the court upon the foreclosure of the mortgages, but although the plaintiff has had the advantage of the allowance, he comes forth to assert that the fee so allowed was in excess of the reasonable value of the services." Counsel seems to be in error as to whether or not the question of *quantum meruit* was raised or considered in the briefs.

We did not overlook the difference between a contract to do an immoral act and a contract to do a legal act, the agreement as to the consideration being void and leaving the creditor to recover on a *quantum meruit.*

The admission of the plaintiff in his replication as to the allowance by the court and the reasonable value of the services rendered was not made by the plaintiff, but was the result of the court's action on motion to strike out the language of the replication. It is hardly permissible for a party to move the court to strike out part of a sentence or paragraph and then charge the pleader with meaning to say what the part remaining in the pleading declares, whereas the remainder of the sentence or paragraph depends for its real meaning and intendment upon the part stricken out.

The effect of the striking out of the parts of the replication as to the $1,500 matter was to make the plaintiff confess the

cause of action in the sum of $1,500 on a *quantum meruit*. Practically the same remarks apply to the action of the court in striking out the parts of the replication referring to the other counterclaim for $500.

The effect of the pleading, as to the matters, before striking out was, it is true, to admit the services as having been rendered, but also to set up circumstances from which the court and jury might determine that the agreement as to the compensation was immoral and that $750 and $250, respectively, had been actually paid therefor, or that the services were worth only $750 and $250, respectively, which sums had been severally paid.

The parts stricken out included, in effect, the declaration that $1,000 had been paid to the defendant in full for the said services, and that this was part of the $2,000 which defendant admitted had been paid on the note. This, certainly, plaintiff had the right to allege whether the counterclaim was on a *quantum meruit* or express contract. It was not intended that anything in the opinion should be construed to mean that, if the services were legally rendered, they should not be recompensed in a reasonable sum if the agreement to pay a fixed compensation was void, but if the alleged contract to pay a fixed sum was immoral and had been executed as claimed, the plaintiff had a right to so allege and prove.

The statement contained in the said opinion that the plaintiff had the right to tell the facts to the court and jury in any way that the matter of the said contract for professional services might be considered, is withdrawn, as meaning more than the Court intended to say.

The motion for re-hearing is denied.

Motion denied.

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STATE EX REL. SACKETT, RELATRIX, *v.* THOMAS, DEFENDANT.

(No. 1,669.)

(Submitted April 1, 1901. Decided April 8, 1901.)

Constitution—Local or Special Laws—Changing the Names of Counties—Mandamus.

1. Constitution, Art. V, Sec. 26, prohibiting the legislature to pass local or special laws changing the name of persons or "places" applies to changing the names of counties, notwithstanding Article VI, Sec. 4, and Article XVI, Secs. 1, 3, recognize the power of the legislature to create new counties and to change those already established.
2. Under the Constitution the legislature has the power to create counties and give them names, or destroy them, but after they are created they may not be disturbed by special or local legislation, except incidenally in the exercise of the creative power, or in cases where a general law cannot be made applicable.
3. The word "persons" used in the Constitution, Art. V, Sec. 26, embraces all persons, whether natural or artificial.
4. Under Code of Civil Procedure, Secs. 150, 152, requiring a district court to have a seal, and prescribing its form and the words to be inscribed on it; and Section 1210, permitting the party in whose favor a judgment is given to have a writ of execution for its enforcement, on demand, at any time within six years after entry, which writ is required, by Section 1211, to be issued in the name of the state, sealed with the seal of the court, and subscribed by the clerk, etc.,—a writ of mandate to compel the clerk to issue an execution with the seal, bearing the former name of a county, is the proper remedy, where the legislature, by a void act, has attempted to change the name of a county.

APPLICATION for writ of mandate by the state, on the relation of Mrs. M. A. Sackett, against the clerk of the district court of the Third judicial district for Deer Lodge county. Writ granted.

Mr. C. E. Sackett and *Mr. W. H. Trippet,* for Relatrix.

Mr. James Donovan, Attorney General, for Defendant.

Senate Bill No. 84 changes the name of Deer Lodge County to Daly County.

The first proposition involves the interpretation of the word "places," and the construction to be placed upon the clause of the constitution when considered in its application to Senate Bill No. 84.

The rules of construction and interpretation of constitutions in statutes are well settled, and it is only necessary to apply them to the particular case under consideration.

1. It is a cardinal rule in the interpretation of constitutions that words are presumed to have been employed in their natural and ordinary meaning. (Am. & Eng. Enc. Law, Vol. 6, p. 924; *Miller* v. *Dunn,* 72 Cal. 462; *Sprague* v. *Norway,* 31 Cal. 173; *Matter of McGuire,* 57 Cal. 605; *Weill* v. *Canfield,* 54 Cal. 111; *Oakland Paving Co.* v. *Wilton,* 69 Cal. 493.) Every word employed in the constitution is to be expounded in its plain, obvious, common sense meaning, unless the text furnishes some ground to control, qualify or enlarge it. (Story, Const. Sec. 451.) A constitution is not interpreted by technical rules of art which the law gives, to ascertain its meaning, but it is to be studied in the light of ordinary language, the circumstances attending its formation and the construction placed upon it, by the people whose bond it is. (*Cronise* v. *Cronise,* 54 Pa. St. 255.) "A special act of the assembly which changes the name of a poor district, is not within the prohibition of the constitution against the changing of names of persons or places." (Gen. Dig. 1900, p. 4158, Sec. 15 (f).) The above is from a Pennsylvania case, reported in 5 Lackawanna Legal News, 332. Even where a word having a technical as well as a popular meaning is used in the constitution, the courts will generally accord to it its popular signification, unless the very nature of the subject indicates, or the text suggests, that it is used in its technical sense. (Am. & Eng. Enc. Law, Vol. 6, p. 925, and cases cited.) A constitution is not to be interpreted according to the words used in particular classes, but with a view to ascertain the sense in which the words were employed; and its terms must be taken in their ordinary and common acceptation, because they are presumed to have been so understood by the

framers, and by the people who adopted it. (*Manley* v. *State*, 7 Md. 135; *Bandley* v. *Isaac*, 13 Md. 202.)

2. "To arrive at the meaning of the constitution, as of any other writing, the whole of it must be examined. If there is apparent conflict it is the duty of the court to harmonize them, if it can be reasonably done, so as to give effect to every portion of the instrument." (*Matter of Maguire*, 57 Cal. 604, 607.) If words happen to be dubious, their meaning may be established by comparing them with the context, or by comparing them with other words and sentences in the same instrument. (Story, Const. Sec. 400.) "In addition to construing the independent technical and popular meanings of a word used in an act or constitution, we may look to other sections of the same instrument for the sense in which the word is used, as an aid to determine whether it has been used in its popular sense in the particular provision under consideration." (*Miller* v. *Dunn*, 72 Cal. 462; *People* v. *Eddy*, 43 Cal. 331.)

3. Every presumption is in favor of the constitutionality of a legislative enactment, and the judicial department will be justified in pronouncing it unconstitutional only when it becomes a manifest usurpation of power. (Am. & Eng. Enc. Law, Vol. 6, p. —.) The power of the judiciary to declare a statute unconstitutional should never be exerted except where the conflict between it and the constitution is palpable and incapable of reconciliation. (*Stockton, etc. R. R. Co.* v. *City of Stockton*, 41 Cal. 147.) The unconstitutionality of a statute must be clear and manifest before a court should declare it, so that where any reasonable doubt exists as to its constitutionality it should be upheld. (*People* v. *Van Gaskin*, 5 Mont. 352; *People* v. *San Francisco, etc. Ry. Co.*, 35 Cal. 606; *Myers* v. *English*, 9 Cal. 341; *Ex parte Newman*, 9 Cal. 502; *Hobart* v. *Butte County*, 17 Cal. 23.) "Under the established rule of strict construction applicable to state constitutions, an act of the legislature should never be declared unconstitutional unless there is a clear repugnance between the statute and the organic law." (*S. P. Ry. Co.* v. *Orton*, 32 Fed. 457.) In the case

last above cited the court said: "If it is *possible*, therefore, that the city of Stockton may have a public interest in this railroad, then the legislative action is conclusive here that the city does in fact have such an interest." (p. 172.) In the case of *Booth* v. *Town of Woodbury*, 32 Conn. R. 128, the following language is used by the court: "If there be the *least possibility* that making the gift will be promotive *in any degree* of the public welfare, it becomes a question of policy * * * and the determination of the legislature is conclusive." "The judiciary always look at acts of the legislature with great respect, and reconcile and sustain them if possible. * * * The presumption that such a body has sanctioned enactments in violation of the constitution is not to be lightly indulged." (*Stockton, etc, Ry. Co.* v. *City of Stockton*, 41 Cal. 160.)

4. "The settled rule of the construction of state constitutions is that they are not special grants of powers to legislative bodies, but general grants of all legislative powers not actually prohibited or expressly excepted. It is equally well settled that the exception must be strictly construed. The construction is strict against those who stand on the exception and liberal in favor of the government itself." (*S. P. Ry. Co.* v. *Orton*, 32 Fed. 457.) In the case of the states the exercise of all the usually recognized powers of the legislature is valid unless actually prohibited or expressly excepted. (*Smith* v. *Twelfth Dist. Judge*, 17 Cal. 547; *State* v. *Rogers*, 13 Cal. 160; *People* v. *Coleman*, 4 Cal. 46, 60 Am. Dec. 581.) "The federal constitution confers powers expressly enumerated, that of the state contains a general grant of all powers not excepted. The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict against those who stand upon the exceptions, and liberal in favor of the government itself." (*Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 160.) "Where no constitutional restriction exists, the corporate existence and powers of counties, cities and towns are subject to legislative control." (Dillon, Mun. Corp. Sec. 186.) The legislature has the power to abolish a county organi-

zation. (Dillon, Mun. Corp. Secs. 46, 65; *State* v. *Hamilton,* 40 Kan. 323; *People* v. *Hill,* 7 Cal. 97; Cooley, Const. Lim. 228-9; *Patterson* v. *Yuba Co.*, 13 Cal. 333.) The Constitution of the State of Montana expressly authorizes the creation of new counties, and the only limitation placed upon such power of the legislature is that the new county shall pay its ratable proportion of existing indebtedness. (Art. XVI, Sec. 3, Const.) "In the interpretation of a power all the ordinary means to execute it are to be deemed a part of the power itself." (Story's Const. Sec. 430.) "Wherever a general power to do a thing is given, every particular power necessary for doing it is included." (*Id.* Sec. 434.)

Webster's International Dictionary gives nine definitions of the word "place," of which the only pertinent one is the third, which reads as follows: "A position which is occupied and held; a dwelling, a mansion; a village, town or city; a fortified town or post; a stronghold; a region or country." It will be noted that this definition is in fact a number of different definitions, grouped together because of similarity.

The definitions given in the Standard and Century are very similar; the Standard giving 13 definitions and the Century 23. In none of these definitions does the word county occur, nor is there anything which justifies the application of the word to a county except under some such general and indefinite term as a locality or region, or a particular space marked by boundaries.

The law dictionaries, Bouvier's, Anderson's and Black's, give the definition of place as follows: "The word place is a very indefinite term. It is applied to any locality limited by boundaries, however large or however small; it may be used to designate a country, state, county, town or a very small portion of a town. The extent of the locality designated by it must generally be determined by the connection in which it is used." This definition is taken verbatim from the opinion of the court in *Law* v. *Fairfield,* 46 Vermont 432, which was decided in 1874. The question involved in the case was the interpretation and con-

struction of the word "place" occurring in a statute requiring notice in writing to be given "stating the time when and the place where such injury was received," upon a public highway.

There is also a reference in Anderson's definition to the case of *Clapp* v. *Burlington,* 42 Vt. 579, in which the court construed the word "place" occurring in a federal statute to apply to the state generally, and not to any particular part of the state. The phrase under consideration was as follows: "At the place where such bank is located."

In the *Matter of Maguire,* 57 Cal. 604, the court was called upon to construe the word "disqualify" as used in the constitution, and as affecting the constitutionality of a statute. It is significant that the court in that case quoted the definitions of the word as given by Webster and Worcester, and does not appear to have taken any other definition into consideration.

If a broad meaning is to be given to the word "places" it must take in all municipal corporations in the state,—townships, school districts, road districts, towns and cities, as well as judicial representative and senatorial districts. If this be true, then the legislature plainly violates the constitution every time it creates a new county, by giving it a new name; for thereby the name of every school district and every road district in the new county is changed. Section 1750, Political Code, provides that each school district "shall be known as District No.....of ..... County." The name of the county being an integral part of the name of the district, a change of the county's name by *special act,* being in effect a change of the name of the school districts, is prohibited, provided that the word "places" includes a school district. The same is true of road districts organized under the new road law.

In fact, to pursue the illustration further, the creation of a new county is in effect a change in the name of the county, since that part of the county which was formerly known as Deer Lodge is now known as Powell; for the same reasoning which would make the term "place" apply to a county, would make it apply to all parts of it. To paraphrase the definition

given in the law dictionaries, "it may be used to designate a county, or a very small portion of a county."

While the construction and interpretation of the word "persons" as used in the clause under consideration is not directly involved here, it is proper to be considered, and may be of importance, as it is used in connection with the word "places," and may throw some light upon the interpretation to be placed upon the latter.

The word "person" in its broad and comprehensive significance includes both natural and artificial persons, and the courts of New York have always held that where the word "person" occurs in the statutes it includes corporations. (*Field* v. *N. Y. Central Ry.*, 29 Barb. 176.)

Notwithstanding such construction of the word where it occurs in the statutes, the courts of New York have held that "the constitutional limitation upon the legislature to change the name of persons has no application to corporations." (*Moran* v. *Lyndecker*, 27 Hun. 585.)

It must be conceded, therefore, that the word "persons," as used in the section under consideration, is used in its narrow and restricted sense, and includes only natural persons. By analogy, and following the rule laid down that reference may be had to the context in ascertaining the meaning or sense in which a word is used, must it not follow that the word "places" is used in the same narrow and restricted sense? Is it reasonable to say that while the word "persons" is used in its *restricted* sense, the word "places" is used in its *broad* sense, when both are used in the same connection? "The extent of the locality designated by it must generally be determined by the *connection* in which it is used."

And further, if the word "persons" is intended to apply to natural persons only, why may it not be argued that the word "places" refers to natural places, such as lakes, rivers, creeks, canyons, valleys, mountains, etc. Their names are given to them by the people in the first instance, and not by the legislature or the constitution; and it is right and proper that the

people should prohibit the legislature from changing them by special act.

But in the case of a county, its name, if it is newly created, is given to it by the legislature in the first instance, and there is no reasonable argument that can be advanced why the legislature should not be permitted to change by special act that which it created by special act. There is no argument which could be advanced against the advisability of entrusting to the legislature the changing of the name of the county, which could not with equal force be applied to the power of the legislature to name a county in the first instance.

The section in question being an exception to the general power of the legislature to pass special laws upon every subject, it must be strictly construed as against the relatrix in this case, who relies and stands upon the exception, and liberally construed in favor of the constitutionality of the act.

There being an express power given to the legislature to create new counties, the naming and changing of the names of such counties is an incident of the power to create, and therefore the power to change the name is included within the power to create.

It will not be denied that if the change of names in the two counties had been incorporated in the original bill dividing Deer Lodge county, it would be constitutional. And it is within the power of the legislature to repeal Senate Bill No. 3, by which Deer Lodge county was divided and Powell county created. This would leave Deer Lodge county as it was before the passage of Senate Bill No. 3, and the legislature could then pass a law dividing Deer Lodge county, naming one portion of it Daly county, thereby accomplishing by circumlocution that which it is contended is expressly prohibited by the section under consideration.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

By the first section of an Act of the Seventh Legislative

Assembly, passed on March 7, and approved by the governor on March 8, 1901, it is declared "that county of the state of Montana now named and known as Deer Lodge county shall no longer be Deer Lodge county, but shall hereafter be the county of Daly, and shall be named, designated and known as and shall constitute Daly county. The boundaries of said Daly county shall be the same as the boundaries of Deer Lodge county now are, and the city of Anaconda shall be the county seat of said Daly county until changed according to law." The following five sections of the Act contain provisions designed to continue the administration of county affairs without change, except in the name, and to preserve and protect the outstanding obligations of Deer Lodge county. By express provision in the seventh section thereof, the Act became operative at once.

On February 8, 1901, there was duly docketed in the office of the defendant, the clerk of the district court of the Third judicial district, at Anaconda, a deficiency judgment in favor of the relatrix for the sum of $1,119.68, and against Mary and Joseph MacCaffery, this amount remaining unpaid after sale by the sheriff of certain real estate under a decree of foreclosure made and entered by said court in favor of relatrix, and against said Mary and Joseph MacCaffery, on January 7, 1900. This judgment being then unsatisfied, the relatrix, on March 23, 1901, applied to the defendant for execution thereon, but at the same time demanded that he issue the execution under the seal of the court theretofore used, under the provisions of law requiring a seal and prescribing its form, with the words "Deer Lodge County" inscribed thereon instead of the words "Daly County;" claiming that the said Act of the legislative assembly is invalid and ineffectual to change the name of the county from "Deer Lodge" to "Daly," and to authorize the corresponding change in the inscription upon the seal. The defendant agreed to issue the writ as demanded, but under the seal of the court for "Daly" instead of "Deer Lodge" county, and refused to authenticate it as relatrix de-

manded. The relatrix alleges that the defendants mentioned in said judgment are personally liable thereon, and that they own real estate situated in the city of Anaconda of great value, upon which her judgment is a lien. Upon an affidavit filed in this Court on March 27, setting forth the foregoing facts and in addition thereto a sufficient reason why this Court should entertain jurisdiction in the first instance, an order was made directing notice to be given to the defendant to appear and show cause on April 1 why an alternative writ should not issue. The attorney general, appearing for the defendant, resisted the application, on the ground that the affidavit does not state facts sufficient to warrant the relief demanded. Thereupon, by agreement, the parties submitted to the Court the question whether the peremptory writ shall issue.

The position of counsel for relatrix is that the act changing the name of Deer Lodge county is void, because it is obnoxious to Section 26 of Article V of the State Constitution, which provides: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Changing the names of persons or places. * * * In all other cases where a general law can be made applicable, no special law shall be enacted." Section 150 of the Code of Civil Procedure provides that the district court must have a seal, and Section 152 of the same Code prescribes its form and the words to be inscribed upon it, including, among others, the name of the proper county. Section 1210 of that Code permits the party in whose favor a judgment is given to have, upon demand, at any time within six years after entry thereof; a writ of execution for its enforcement. Section 1211 provides: "The writ of execution must be issued in the name of the state of Montana, sealed with the seal of the court, and subscribed by the clerk," etc. If, therefore, the position of counsel is correct, the writ must issue; for if it was not within the power of the legislature, by a special law, to change the name of the county of Deer Lodge, the act in question is void, and does not justify the defendant in refusing to comply with

the demand of relatrix, and his refusal leaves her without any plain, speedy and adequate remedy in the ordinary course of law; for it is manifest that she is entitled to have such a writ as the law authorizes, to the end that the proceedings thereunder may not be open to question, or that she be put in peril of defeat at any stage thereof.

The questions presented and argued at the hearing are (1) whether the word "places," used in the constitution, includes counties, thus bringing the law within the express prohibition against "changing the names of persons and places;" and (2) whether it is obnoxious to the general provision forbidding a special law in any case where a general law can be made applicable. The provision prohibiting special or local laws is found in the constitutions of many of the states in the Union, some of them nearly identical with that in our own, but, so far as we are aware, no court of final resort in any state has considered and defined the term "places" as used in the phrase in question. The word "place," in popular usage, is a very indefinite term. It is used of an area or portion of land marked off by boundaries, real or imaginary, as a region, locality, site, spot; it is applied to a city, town or village; it is used of a building with adjoining grounds, or of a building or part of a building set apart for a particular purpose, as a theater or church; it includes a fortress or fortified post; it designates a room to abide in, or a seat in such a room, or in a coach or public place; and it is often used of a mere point, as, for instance, "the place of beginning," upon a boundary line, or the point where two lines meet. In legal parlance, it is equally indefinite. Anderson defines it thus: "Any locality limited by boundaries, however large or small, as a country, a state, a county, a town, or a portion thereof. The extent of the locality is to be determined by the connection in which the word is used." This definition is taken substantially from *Law* v. *Fairfield,* 46 Vt. 425, where the word, as used in a statute requiring notice to be given to a town of the time and place where an injury was received upon a highway,

was held to mean the particular point on the highway; the mere mention of a certain highway several miles in length not being sufficiently definite. In the same state, in construing the word as used in the Act of Congress of June 3, 1864, creating the national banking system and permitting shares in a national bank to be taxed "at the place where such bank is located," the term was held to mean the city or town where the owner resided. (*Clapp* v. *Burlington,* 42 Vt. 579, 1 Am. Repts. 355.) So the New Jersey Supreme Court, in construing the same statute, held the word "place" to mean the municipal district which, having the power, imposes the tax. (*State* v. *Hart,* 31 N. J. Law, 434.) Bouvier gives substantially the same definition as Mr. Anderson, citing *Law* v. *Fairfield, supra.* In the phrase "law of the place of the contract," the word "place" is used of a state or country. So, also, in the expression "place of trial," used in the Code of Civil Procedure and the Penal Code (Code of Civil Procedure, Secs. 615-619; Penal Code, Sec. 1970), the word primarily means county, and not the immediate place where the trial court sits. In this connection it is equivalent to neighborhood or place of a crime, or a cause of action, or the political division within which a jury must be gathered for the trial, and is synonymous with the word "venue." In other parts of the constitution itself it is used some 18 times, with a great variety of applications. It is applied to a point in a boundary line, a cemetery, a church, a building where an election is held, a military reservation, a dwelling, a court of justice, the capital of the state, to cities, towns, villages, and railroad stations, an institution of learning, and in one instance to the whole state or congressional district. These enumerated instances sufficiently illustrate the indefinite meaning and varied application of the term, both in popular and legal usage. This indefinite meaning likewise demonstrates that the proper signification of the term as used in the constitution must be deduced from the context in which it is found, and the purpose had in view in putting into the organic law of the state an express prohibition of any special legislation with

reference to the name by which a particular one of the class designated by it shall be known. If the mere matter of the name of a place was of so much import in the estimation of the framers of the constitution that they deemed it necessary to insert the prohibition therein, then that prohibition was evidently designed to forestall any evil which might befall at the hands of the legislature through hasty, inconsiderate or precipitate action. In our effort to discover a purpose, thus indicated but not clearly defined, we may refer to the other matters coming within the same prohibition. As to the matter of divorces, the express prohibition was clearly designed to take the power of granting them in particular instances from the lawmaking branch of the government, and to vest it in the judicial department, under uniform laws, to be administered equally for all applicants showing themselves entitled to relief, and thus destroy the possibility of scandal and injustice, often wrought through the medium of personal influence and favoritism. So, also, in prohibiting special and local laws with reference to roads and highways, the locating or changing of county seats, and the regulating of county and township affairs, there is clearly evinced a purpose that all these matters should be left to the people of the particular locality, to be managed, at their discretion, under general laws applicable to all parts of the state. Again, with reference to courts of justice, the rules of evidence in particular cases or inquiries and changes of venue, one object sought was to obtain independence of action and uniformity of administration of the law by the courts provided for by the constitution or established under general laws, so that "right and justice should be administered without sale, denial or delay." (Constitution, Art. III, Sec. 6.) And so, continuing through the list, we find that in each particular enumerated the prohibition is founded upon a substantial, not a sentimental, reason, and that in each case it makes for the administration of justice under equal laws.

Turning, now, to discover the purpose of the prohibition in question, we may at once assume that the principal connection

in which names of places were deemed of sufficient importance to become a matter of legislative cognizance was with reference to the political divisions and municipalities of the state; for it cannot be admitted for a moment that the framers of the constitution, while considering matters of so much import as those to which we have just adverted, bethought themselves that it would be wise, for sentimental reasons, to prohibit the enactment of special laws changing the names of mountains, valleys and similar well known objects upon the face of nature, and omitted consideration of these governmental agencies altogether. Evidently one purpose, at least, sought to be accomplished, was to preserve to the people of a particular locality the right to retain a name chosen by themeselves, or one for which an attachment had been formed by long association, and at the same time to serve a governmental purpose by avoiding the confusion which might arise from a frequent change of the names of the political subdivisions and municipalities of the state. Frequent change destroys local attachments, and the want of this feeling tends strongly to weaken those sentiments of local pride which contribute so much to the upbuilding of a particular community. Again, it leads to confusion in the administration of local affairs, and adds materially to the expense and labor on the part of the people and those who serve the public—necessary to preserve the identity and continuity of local authority. On a change of names of an incorporated city or town, for instance, there would necessarily be a corresponding change in its records, a substitution of one name for another in all of its obligations and contracts, and a change in the designation of its officers and courts, all of which would lead to confusion and considerable expense. So, also, in the change of a name of a county, like changes would be necessary in the particulars just mentioned with reference to cities and towns, and, furthermore, uncertainty and confusion would arise as to the propere record of titles to lands and the obligations of the municipality, all of which would impose labor and expense. True, the incorporated city or town pos-

sesses very different powers, and is under different liabilities, from those of a county; but in the important respect that they are both intrusted under the constitution with the exclusive power of taxation for local purposes, and the management of local affairs without interference by the legislature, they occupy relatively the same positions as governmental agencies. One is a voluntary organization by permission of the legislature, and the other is, or may be, the creature of the legislature; nevertheless, each, in the management of its local affairs, is, ordinarily, free and independent, except so far as it may be controlled by general laws operating upon all alike. The term "places," as used in the constitution, unless it was intended to be applied only to objects upon the face of nature, must be applied to both of them alike; for we can discover no reason why it should include the former and exclude the latter. True, the constitution recognizes the power of the legislature to create new counties, to change those already established, and to alter their boundaries (Constitution, Art. VI, Sec. 4; *Id.* Art. XVI, Secs 1, 3), and this power has been heretofore exercised in many instances. It has been recognized and affirmed by this Court, as in *Holliday* v. *Sweet Grass County,* 19 Mont. 364, 48 Pac. 553, where a special Act creating the defendant county was upheld; and this power to create necessarily implies the power to destroy, so that, in the exercise of it, the legislature may abolish a county organization, and incorporate its territory within another county. It may also at the same time exercise any other power incidental to a complete exercise of the principal one; but this power does not necessarily carry with it the right to interfere by special enactment in the internal affairs of the county, even though a majority of the people do not object. The whole spirit of the constitution is opposed to this species of interference, and, for the reasons already stated, it seems clear to us that the prohibition in question was designed to prevent just such interference as has been attempted in the present instance. The power to create counties and give them names, or to destroy them, is unquestioned; but after they are

created they may not be disturbed by special or local legislation, except incidentally, in the exercise of the creative power, or in cases where a general law cannot be made applicable.

'In reaching this conclusion, we have not overlooked the familiar fundamental principle that the constitution of a state is not grant of legislative power, but a mere limitation upon it, and that the legislature possesses power to legislate upon all matters except in so far as it may be expressly forbidden by the constitution, or where the particular subject has been delegated to the federal government. We have also borne in mind the rule that a statute must be clearly and manifestly in contravention of the constitution, or the court will not declare it so. It is only by an application of these principles to the situation here presented that we have adopted the views stated.

We are strengthened in our conviction by the fact that the word "person," used in the phrase under consideration in the constitution of the state, is properly construed to embrace all persons, whether natural or artificial. This view is taken by the Supreme Court of California in *In re La Societe Francaise d'Epargnes et de Prevoyance Mutuelle,* 123 Cal. 525, 56 Pac. 458, where it is held that the word applies to a banking corporation. So, also, the Supreme Court of the United States has declared that this term, as used in the fourteenth amendment to the Constitution of the United States, includes railroad corporations as well as natural persons. (*Santa Clara County* v. *Southern Pac. R. Co.,* 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118.) Reasoning by analogy, it is fair to conclude that the word "places" is here used in its less restricted meaning, and applies to counties, with their subdivisions, as well as to incorporated cities and towns; thus including all classes of municipalities, while not excluding, perhaps, well known natural objects.

The result reached precludes the necessity of considering the second question urged.

It is ordered that judgment be entered that the peremptory writ issue as prayed, and that the relatrix recover the costs of this application.

Writ granted.

CHICAGO TITLE & TRUST CO., RESPONDENT (BROWN ET AL., INTERVENERS AND RESPONDENTS), *v.* O'MARR, SHERIFF, ET AL., APPELLANTS.

(No. 1,283.)

(Submitted March 4, 1901. Decided April 8, 1901.)

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39 242

Verdict—Excessive Verdict—Reduction—New Trial—Appeal.

1. Where, in an action for conversion, the trial court regards the verdict as in excess of the value of the property, it is not error to give the plaintiff the option of remitting the excess, and, if he does so, to order the verdict to stand for the residue, instead of granting a new trial absolutely, under Code of Civil Procedure, Sec. 1771, Subd. 6, authorizing the granting of a new trial for insufficiency of the evidence to justify the verdict.
2. With questions of the mere weight of evidence in substantial conflict and the comparative credibility of witnesses the Supreme Court, as an appellate tribunal, has nothing to do.

Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

ACTION by the Chicago Title & Trust Company against James J. O'Marr and others. Ralph Brown and others intervened. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Mr. A. J. Shores, for Appellants.

Mr. H. G. McIntire, for Respondent Chicago Title & Trust Co.

Mr. A. C. Gormley, and *Mr. Richard Bennett,* for Interveners.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This cause was here in November, 1896, on appeals by the defendants from a judgment and an order refusing a new trial,

and is reported in 18 Montana, at page 568 (46 Pac. 809, 47 Pac. 4). This Court finally determined the respective rights of the parties, but reversed the judgment and remanded the cause with directions to try the issue of fact touching the value of the property converted by the defendants on August 7, 1893; the Court saying: "The single point to be retried is the value of the property at the time of the conversion." Conformably to the order of this Court the court below tried the issue as to value. The jury found the value to have been $14,825.25, and that at "forced sale" the property would have brought $11,500. By order of the court, judgment upon the verdict was entered in behalf of the plaintiff and interveners declaring that the value of the property converted was $14,825.25, and adjudging that of said amount the defendants were entitled to retain $5,020, and that the remainder be paid by them to the plaintiff and interveners to the extent of their several rights thereto as declared by this Court. The defendants having moved for a new trial on the grounds that the jury gave excessive damages under the influence of passion and prejudice, that the evidence was insufficient to justify the special verdict, and that the court erred in refusing to instruct the jury as requested by the defendants, the court ordered that a new trial be granted unless the plaintiff should within 30 days file its consent in writing to a modification of the judgment by remitting therefrom the sum of $1,595.55, the amount in which the verdict was deemed "excessive, and not justified by the evidence," the court being of the opinion that the value of the property converted was $13,229.70, and holding that the evidence was insufficient to justify the verdict for a sum in excess of that amount. In compliance with the terms of the order the plaintiff remitted $1,595. 55, the judgment was modified accordingly, and the motion for a new trial was thereupon denied. From the order refusing a new trial and from the judgment as modified, the defendants appeal.

1. Counsel for the defendants assumed that the court below would take a general verdict in favor of the plaintiff and inter-

veners, and framed requests for instructions upon that theory. The jury, however, were directed to find a special verdict upon the issue submitted to them, and counsel does not seem seriously to urge that, under the circumstances, error was committed by the refusal to give the proposed instructions as prayed.

2. The action of the lower court in requiring the plaintiff to remit a part of the amount found by the jury as the condition upon which the motion for a new trial would be denied, is specified as error. It is insisted and argued at length that in cases where damages are allowed by juries for injuries to property or property rights, the practice of requiring a remission is unauthorized by either the common or the statutory law, except where the part which should not have been allowed is so distinguishable from the remainder of the verdict or finding that it may be ascertained by the court. Counsel assert that in the case at bar the value of the property converted was susceptible of ascertainment by application of fixed and definite rules of law, and that therefore the court was without right to reject the verdict of the jury and substitute a finding of its own as the basis of the judgment.

Much of appellants' brief is devoted to a discussion of what the rule is or should be in respect of the right of the court to require a remission of part of the damages found by the jury as the condition of denying a motion for a new trial in cases for injuries to the person or to personal rights, such as libel, false imprisonment, assault and battery, criminal conversation, and the like, where the extent of the injury suffered is often not susceptible of accurate estimation. That the trial court may in such cases require the plaintiff to forego so much of the amount found by the jury as in the opinion of the court was not justified by the evidence, is a rule which finds well-nigh universal recognition. If the appellate court finds that the court below was clearly wrong in deciding that the evidence was insufficient, of course the order would be erroneous and might be prejudicial. Many courts have decided that if the excessive damages appear to have been awarded under the in-

fluence of passion or prejudice, a new trial should be granted absolutely unless it is plain that the other issues were correctly decided by the jury. Whether in the class of cases mentioned where the damages appear to be both excessive and the result of passion and prejudice, the court would be justified in making an order refusing a new trial upon the plaintiff's remitting a certain part of the damages awarded to him by the jury (a question adverted to, at least, in *Kennon* v. *Gilmer,* 5 Montana, 257, 51 American Reports, 45, 5 Pacific Reporter, 847, and in *Cunningham* v. *Quirk,* 10 Montana, 462, 26 Pacific Reporter, 184), need not be considered in the present case. The general rule stated was approved and applied in *Kennon* v. *Gilmer,* 9 Montana, 108, 22 Pacific Reporter, 448, in *Gilmer* v. *Kennon,* 131 United States, 22 (9 Sup. Ct. 696, 33 L. Ed. 110), and in *Hamilton* v. *Great Falls Street Railway Co.,* 17 Montana 334, 42 Pacific Reporter 860, 43 Pacific Reporter 713.

It is contended that the rule is inapplicable to a case, such as the one at bar, where the amount of damages is measured by the value of the property converted or is otherwise susceptible of accurate ascertainment.

Section 1171 of the Code of Civil Procedure provides, in substance, that a new trial may be granted because of: "(5) Excessive damages, appearing to have been given under the influence of passion or prejudice. (6) Insufficiency of the evidence to justify the verdict or other decision." Unless excessive damages appear to have been awarded under the influence of passion or prejudice, a new trial cannot properly be granted for the cause specified in the fifth subdivision; if, however, the damages exceed the amount which the evidence justifies, a new trial may be granted upon the ground stated in the sixth subdivision, or the court may, in its discretion wisely exercised, refuse a new trial upon the proper remission by the plaintiff. In *Gilmer* v. *Kennon, supra,* the Supreme Court of the United States, in considering the provisions of the Code of Civil Procedure of Montana then in force, which designated among the grounds upon which motions for new

trials might be granted the causes specified in subdivisions 5 and 6 of Section 1171, *supra,* said: "Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest;" and this quotation is cited in *Cunningham* v. *Quirk, supra,* as expressive of the law upon that subject in this state.

If there was not any evidence to support the verdict for an amount in excess of $13,229.70, or if there was some evidence tending to support the verdict for the excess but the evidence was not in the opinion of the court below of sufficient weight to justify it, the court should either have grantetd a new trial absolutely or in the exercise of its judicial discretion have refused a new trial upon the remission of the excess. In the case before us the court below was of the opinion that the verdict of the jury for $14,825.25 was excessive in the sum of $1,595.55, the evidence being insufficient to justify the jury in finding that the property converted was of a greater value than $13,229.70. For aught that appears to the contrary, the conditional order for a new trial was made for the cause mentioned in Subdivision 6 of Section 1171, *supra.* The court did not find that excessive damages appeared to have been given under the influence of passion or prejudice, for which cause a new trial may be granted by virtue of subdivision 5, but that the damages were excessive because the evidence was insufficient (either in weight or for want of any probative force) to justify the verdict for more than $13,229.70. Under such circumstances the court in making the order that the motion of the defendants for a new trial be overruled upon the remission by the plaintiff of the amount deemed to be excessive, did not err to the prejudice of the defendants, provided the evidence was sufficient to support the verdict as reduced in amount.

There is a contrariety of opinion upon the question under

discussion, but we think the better reason and the weight of authority accord with the view we have expressed. In *Arkansas Valley Land and Cattle Co.* v. *Mann,* 130 United States 69 (9 Sup. Ct. 458, 32 L. Ed. 854), the action was brought to recover damages for the conversion of cattle by the defendant. The plaintiff, if entitled to recover, was entitled to the value of the animals with their increase, together with interest from the date of the conversion. The jury returned a verdict for the plaintiff in the sum of $39,958.83. On motion by the defendant for a new trial, the court below ordered that if the plaintiff would remit $22,833.33 from the amount of the verdict the motion for a new trial would be denied, but if he declined to do so it would be granted. The plaintiff remitted in accordance with the order and stipulated in writing that judgment might be entered for $17,125, whereupon the motion for a new trial was denied and judgment entered for the latter-named sum. To the action of the court in respect of the remission and to the order refusing a new trial the defendant excepted. On writ of error the case was taken to the Supreme Court of the United States; we quote the reasoning of that court upon the precise question here presented: "The point was much pressed at the bar that the remission by the plaintiff of a part of the verdict, followed by a judgment for the sum remaining, deprived the defendant of his constitutional right to have the question of damages tried by a jury, without interference upon the part of the court, except as it became necessary to instruct them in reference to the principles of law governing the determination of that question. The precise contention is, that to make the decision of the motion for a new trial depend upon a remission of part of the verdict, is in effect a re-examination by the court, in a mode not known at the common law, of facts tried by the jury, and therefore was a violation of the seventh amendment of the constitution. The counsel for the defendant admits that the views expressed by him are in conflict with the decision in *Northern Pacific Railroad Co.* v. *Herbert,* 116 U. S. 642, 646 (6 Sup. Ct. 590, 29

L. Ed. 755); but he asks that the question be re-examined in the light of the authorities. That was an action against a railroad company for the recovery of damages resulting from the negligence of its representative, whereby the plaintiff sustained serious personal injury. The verdict was for $25,000, and a new trial was ordered unless the plaintiff remitted $15,000 of the verdict. He did remit that sum, and judgment was entered for $10,000. This court said: 'The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict, was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive, it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand,'—citing *Blunt* v. *Little,* 3 Mason, 102, 107, Fed. Cas. No. 1,578; *Hayden* v. *Florence Sewing Machine Co.,* 54 N. Y. 221, 225; and *Doyle* v. *Dixon,* 97 Mass. 208, 213, 93 Am. Dec. 80. In *Blunt* v. *Little,* which was an action for malicious civil prosecution, in which the verdict was for $2,000, Mr. Justice Story, while admitting that the exercise of the discretion of the court to disturb the verdict of the jury was full of delicacy and difficulty, recognized it to be a duty to interfere when it clearly appeared that the jury had committed a gross error, or acted from improper motives, or had given damages that were excessive in relation either to the person or the injury; and held that the cause then before him should be submitted to another jury unless the plaintiff remitted $500 of the damages. The remission was made, and the new trial refused. In *Doyle* v. *Dixon,* which was an action for breach of contract, the language of the court was: 'When the damages awarded by the jury appear to the judge to be excessive, he may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue.'

To the same effect are many other cases. (*Guerry* v. *Kerton,* 2 Rich. Law, 507, 512; *Young* v. *Englehard,* 1 How. (Miss.) 19; *Diblin* v. *Murphy,* 3 Sandf. 20. See, also, numerous authorities collected in Sedgwick on Damages (6th Ed.), 765, note 3; 1 Sutherland on Damages, 812, note 2; 3 Graham & Waterman on New Trials, 1162.) The practice which this court approved in *Northern Pacific Railroad Co.* v. *Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. (*Ducker* v. *Wood,* 1 Term R. 277; *Hewlett* v. *Crutchley,* 5 Taunt. 277, 281; authorities cited in Sedgwick on Damages (6th Ed.), 762, note 2.) But in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case. But it is contended that the plaintiff could not have been required to remit so large a sum as $22,833.33, except upon the theory that the jury, in finding their verdict, were either governed by passion, or had deliberately disregarded the facts that made for the defendant; in either of which cases the duty of the court was to set aside the verdict

as one not fit to be the basis of a judgment. Undoubtedly, if such had been the view which the court entertained of the motives or conduct of the jury, it would have been in accordance with safe practice to set aside the verdict, and submit the case to another jury. That was the course pursued in *Stafford* v. *Pawtucket Haircloth Co.*, 2 Cliff. 82, Fed. Cas. No. 13,275. In that case Mr. Justice Clifford, after observing that the damages were greatly excessive, and without support in evidence, said: 'Such errors may in many cases, and under most circumstances, be obviated by remitting the amount of the excess; but where the circumstances clearly indicate that the jury were influenced by prejudice, or by a reckless disregard of the instructions of the court, that remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.' This court is not, however, authorized to assume from the mere fact that $22,833.33 was remitted that the court below believed that the jury were governed by prejudice, or willfully disregarded the evidence. On the contrary, it may be inferred that the amount for which the plaintiff was entitled to a verdict was ascertained by the court after a calculation based upon the prices of cattle as given by numerous witnesses; or that the court became satisfied that the preponderance of evidence as to the ownership of some of the cattle was against the plaintiff; or, as to other cattle, that they were not traced to the possession of the defendant." This was approved in *Gilmer* v. *Kennon,* 131 United States, 22 (9 Sup. Ct. 696, 33 L. Ed. 110). *Doyle* v. *Dixon,* 97 Mass. 208 (93 Am. Dec. 80), was an action to recover damages for the breach of a contract. A verdict for $800 was returned for the plaintiff, which the defendant moved to be set aside for excessive damages and as contrary to the weight of the evidence. The judge was of opinion that the damages were excessive, but upon the plaintiff's remitting $400 ordered the verdict to stand for the remainder. The court, through Mr. Justice Gray, said: "The defendant has no ground of excep-

tion to the action of the superior court upon the motion for a new trial. Such a motion, so far as it depends upon the weight of evidence or other matter of fact, is exclusively addressed to the discretion of the presiding judge. When the damages awarded by the jury appear to the judge to be excessive, he may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue. (*Lambert* v. *Craig,* 12 Pick. 199; *Hurry* v. *Watson,* 4 Term R. 659, note; *Blunt* v. *Little,* 3 Mason, 107, Fed. Cas. No. 1,578.) The judge in this case having adopted the latter course, and ordered the verdict to stand for the sum of four hundred dollars, the only question of law arising thereon is whether the law would warrant a verdict for this amount." In *Sills* v. *Hawes,* 14 Colorado Appeals, 157 (59 Pacific Reporter, 422), the action was by a mortgagor against his mortgagee to recover for the conversion of the mortgaged chattels. The defendant asked for a new trial and the court considered that the damages found by the jury were excessive in the sense that $105 of the amount was not, in the opinion of the trial court, justified by the evidence, and suggested that the motion would be sustained unless the plaintiff remitted that sum from the verdict. The plaintiff remitted and the motion was denied. Said the court: "The defendant filed a motion for a new trial, among other grounds for asking which alleging that the damages were excessive. In hearing this motion the court seems to have considered this objection well taken, and suggested that, upon condition the plaintiff remitted the sum of $105 from the verdict of the jury, the motion would be overruled; otherwise, it would be sustained. The plaintiff in open court electing to remit the amount suggested, the motion was denied. Defendant insists that this is reversible error. He contends that the court had no right to substitute its judgment for that of the jury as to the amount of the damages, and that it had no right nor power to ask the plaintiff to remit in a suit of this character, where it was an action for unliquidated damages; that such power exists, if at

all, only in actions for liquidated damages, and where there has been an error in computation, or of some similar character. If this be true, why does the Code provide as one of the grounds for a new trial which the unsuccessful party may urge that the damages awarded were excessive, and why did the defendant include this ground in his motion for a new trial? If the finding of the jury is absolutely conclusive, the Code provision would be a nullity. The position of defendant is that in such case the court has no alternative except to award a new trial if it believes the damages given by the verdict of the jury to have been excessive. We do not believe such to be the rule, and certainly it is not in accord with general, and we may say universal, practice in this jurisdiction; nor does it seem to us founded on reason. The court has, of course, no power to compel the successful party to accept its suggestion to remit; but, if he does, we fail to see wherein the unsuccessful party is injured. If it is error, it is in his favor, and he certainly has no right to complain. He is not prejudiced either as to his rights or remedies. The successful party has a right to remit, if he desires, without any suggestion from the court. If errors were committed during the trial, they still remain for review by the appellate court, the same as if judgment had been entered upon the verdict as rendered. That there was no error in the action of the court in this case of which defendant may complain, see Hayne on New Trials & App. Sec. 166; *Gregg* v. *Railroad Co.*, 59 Cal. 312." *Broquet* v. *Tripp*, 36 Kansas, 700, 14 Pacific Reporter, 227, was an action arising from a breach of warranty that certain sheep were sound and healthy. The plaintiff recovered a verdict for $850. The defendant moved for a new trial, which the court refused upon the condition that the plaintiff remit $350 of the verdict. In affirming the judgment the court there said: "The defendant still further complains that the court, as a condition for overruling his motion for a new trial, remitted $350 of the verdict. We think it had ample authority to do so. If the plaintiff consented thereto, the defendant ought not to complain, as the reduction

was in his favor. It seems to be well settled that in actions for damages of this kind an excess in the verdict above what the evidence might justify or satisfactorily estblish may, with the consent of the party in whose favor the verdict was given, be remitted, and judgment entered for the residue. The exercise of such power is sanctioned on the theory that the excess arises either from error of law, misapprehension of the facts, or error in computation by the jury, and that such error does not permeate the entire verdict, and therefore it is competent to correct it. When the assent of the party is obtained whom alone the correction would prejudice, the other party has nothing of which to complain, such order of the court being in his favor. (*Pendleton Street Railway Co.* v. *Rahmann*, 22 Ohio St. 446; *Brockman* v. *Berryhill,* 16 Iowa, 183; *Dawson* v. *Wisner,* 11 Iowa, 6; *Craig* v. *Cook,* 28 Minn. 232, 9 N. W. 712; *Corcoran* v. *Harran,* 55 Wis. 121, 12 N. W. 468.)" The Supreme Court of Wisconsin in *Murray* v. *Buell,* 74 Wisconsin, 14, 41 Northwestern Reporter, 1010, reached the same result by a somewhat different course of reasoning. In *Corcoran* v. *Harran,* 55 Wisconsin, 120, 12 Northwestern Reporter, 468, it was said: "The practice adopted by the trial judge is clearly sanctioned by the great weight of authority. We must, therefore, hold that in actions of tort as well as contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and, in case he does so, order the verdict to stand for the residue. Certainly, the practice will tend to promote justice, and lessen the expense to litigants and the public. Besides, the allowance of such option is no more of an exercise of arbitrary power by the trial judge than it would be for him to set aside the verdict absolutely upon the sole ground that it is excessive, and then, in effect, direct a jury to bring in a verdict for a smaller sum, but not in excess of an amount named by the court." In *Chapin* v. *Bourne,* 8 California. 294,—an action of ejectment,—there was a verdict for $500 damages in addition to a finding generally for the

plaintiff. On the hearing of a motion for a new trial made by the defendant, the court ordered that unless the plaintiff remitted $250 of the damages recovered a new trial would be granted. The plaintiff remitted that amount and the defendant appealed. Said the court: "The court below had a perfect right to require the plaintiff to remit a portion of the damages. It has been repeatedly held that this power was within the discretion of the court, and its exercise has been encouraged." In *Davis* v. *Railroad Co.*, 98 California, 13, 32 Pacific Reporter, 646, the practice theretofore prevailing in California by which motions for new trials were denied upon the remission by the plaintiff of part of the damages awarded by the jury, was approved and declared applicable to liquidated as well as unliquidated damages,—that is to say, to damages susceptible of accurate estimation and to damages allowed by juries in the exercise of sound judgment and discretion where there are no fixed and rigid standards of measurement. The Supreme Court of West Virginia in *Ohio River Railroad Co.* v. *Blake*, 38 West Virginia, 718, 18 Southeastern Reporter, 957, after full consideration, adhered to the doctrine announced in the case of *Arkansas Valley Land and Cattle Co.* v. *Mann, supra.*

3. The final specification is that the evidence was insufficient to support the verdict after its reduction from $14,825.25. to $13,229.70. Although there was a wide divergence of opinion touching the worth of the property, substantial evidence was adduced tending to prove that the value somewhat exceeded the amount of damages ultimately awarded. The credibility of the witnesses and the weight of the evidence were for the jury, subject to the supervisory control and revisory power of the district court exercising its judicial discretion upon the motion for a new trial. With questions of the mere weight of evidence in substantial conflict and the comparative credibility of witnesses this court, as an appellate tribunal, has nothing to do.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE MILBURN: I concur. This Court having, notably in *Kennon* v. *Gilmer,* 9 Mont. 108, 22 Pac. 448, decided that in an action for personal injury a verdict held to be excessive may be reduced without submitting the case to another jury upon a new trial, it seems to me, in reason, unnecessary to discuss the question whether a verdict for damages to property or property rights may be reduced at the option of plaintiff by order of the trial or appellate court. If a verdict for personal injury may be lawfully reduced by the court, why does it not follow, logically and *a fortiori,* that the court has the power to reduce a verdict for injury to property or property rights? In the latter case the verdict is based upon testimony of witnesses who testify to values within their knowledge, and the jurors do not have to grope in the darkness of speculation and conjecture, and the court may be able to definitely discover and point out the exact amount of excess which it intends to subtract from the sum found by the jury. I may say that I cannot see any reason in those decisions which have held that a court may interfere and reduce the verdict in the case of bodily injury and may not do so in the case of injury to property or property rights. The existence of such respectable authorities, however, has made it necessary for Mr. Justice Pigott to cover the case at length. I wish to add also that the weight of the authorities, particularly the decisions of the United States Supreme Court, is so overwhelming in support of the power of the court to reduce verdicts when excessive in the opinion of the court, with option to the plaintiff to accept or decline, that I am forced to concur in the opinion so ably written by Mr. Justice Pigott; but I wish to here go on record as saying that, while in duty bound to bow to the law as it is and has been made by the courts, I am opposed to the tendency of the times to increase the power of the courts, and to permit them to invade those duties which are the sole duties of the jury. I cannot, except in special cases,—as, for instance, where the court by mistaken instructions has led the jury to add some specific sum to the amount which it would otherwise

have found,—believe, notwithstanding the overwhelming weight of authorities, that a court should make itself judge of the weight of evidence or of the credibility of witnesses, as it does in most cases when it scales verdicts. The power to grant new trials in law cases because the verdict is excessive means to give the parties another trial before a jury, and not, in the discretion of the court, to diminish the amount of damages given in the verdict. The action of the court in scaling the verdict and then refusing a new trial is too often to close the door to the losing party in the appellate court; for, notwithstanding the fact that in numerous cases the finding of excessive damages indicates passion and prejudice on the part of the jury, still the presumption is in favor of the act of the court, and the use of sound discretion by it; the effect of the law of verdict scaling being that the court below has, by the use of its intellect, discovered how much the mind of each juror was biased, and has, with a thorough knowledge of the laws of metaphysics, applied the remedy by cutting down the verdict. To dictate a compromise by threat of the expense of a new trial is a convenient way to clear the docket, but ought only to be resorted to in special cases, such as above indicated.

MALONEY ET AL., RESPONDENTS, *v.* KING ET AL., APPELLANTS.

(No. 1,548.)

(Submitted April 8, 1901. Decided April 8, 1901.)

Restraining Order—Appeal—Injunction.

Code of Civil Procedure, Sec. 1722, as amended February 28, 1899, providing that an appeal may be taken from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, does not authorize an appeal from a temporary restraining order pending the hearing of an order to show cause why an injunction *pendente lite* should not be issued.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

SUIT by James H. Maloney and others against Silas F. King and others. From a restraining order, defendants appeal. Dismissed.

Messrs. McBride & McBride and *Mr. E. N. Harwood,* for Appellants.

Messrs. McHatton & Cotter, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

On the 18th day of April, 1900, the district court of Silver Bow county made and caused to be entered an order requiring the defendants to show cause on the 28th day of May why an injunction *pendente lite* should not be issued against the defendants, and meanwhile restrained them from committing the acts which the plaintiffs alleged the defendants were threatening to commit,—in other words, the plaintiffs applied for an injunction upon an order to show cause, and the court enjoined the defendants until the hearing and decision of the application by an order which, by Section 873 of the Code of Civil Procedure, is denominated a "restraining order." From the restraining order the defendants have attempted to take an appeal. The plaintiffs move that the purported appeal be dismissed upon the ground that the order is not one from which an appeal lies.

The question presented was considered and decided in *Wetzstein* v. *Boston & Montana Consol. Copper & Silver Mining Co.,* 25 Montana, 135, 63 Pacific Reporter, 1043, where it was held that Section 1722 of the Code of Civil Procedure as amended in 1899 (Laws of 1899, p. 146) makes provision for an appeal from an order granting or dissolving or refusing to grant or dissolve an injunction, but does not authorize an appeal from

an order granting or refusing a restraining order. In that case this Court said that "there is no appeal from an order granting or refusing a restraining order pending the hearing of an order to show cause why an injunction should not issue." The doctrine in that case is now adhered to; upon its authority the appeal must be dismissed, and it is so ordered. Let *remittitur* issue forthwith.

Dismissed.

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McKAY, Appellant, *v.* McDOUGALL Respondent.

(No. 1,276.)

(Submitted March 1, 1901. Decided April 15, 1901.)

Mining Claims — Location — Forfeiture — Evidence — Instructions—Relocation—Notice of Location—Amendment—Resumption of Work by First Locator.

1. Plaintiff based his title to a mining claim on a location made in 1877, and there was evidence that a third person had located the ground in 1876; but he testified that he never did any work thereon except "to represent the gulch," and there was no other evidence that he ever did any work after his location, while there was some evidence that work had been done on the ground in 1869, but that none was done thereafter until plaintiff located the claim. The court instructed that, if such person located the claim at the time stated, plaintiff could acquire no title by his location, unless such person had abandoned the claim. *Held* that this was misleading, since there might have been a forfeiture found by reason of such person's failure to represent the claim.
2. Abandonment, as applied to mining claims held by location merely, takes place only when the locator voluntarily leaves his claim to be appropriated by tne next comer, and regardless of what may become of it in the future.
3. A forfeiture takes place by operation of law, without regard to the intention of the appropriator, whenever he,—having neglected to make the required annual expenditure upon the claim within the time allowed,—fails to preserve his right by resuming work thereon before a complete re-location by another.
4. In the absence of a statute making additional requirements, or a local rule or custom, a compliance with the statutes of the United States (as to discovery and marking of the boundaries of mining claims) is sufficient.
5. Whether the evidence shows a valid location is a question of fact for the jury,—and not a matter of law for the court to decide.
6. Forfeiture is a question of fact for the jury upon the evidence to decide.

7. Where a mining claim on which plaintiff had located was relocated by defendant, but the notice filed by him was defective, and it was shown that, before it was properly remedied by an amended notice, plaintiff had performed work on the mine, it was error to instruct that on a suspension of work the right to resume was lost, where a qualified relocator enters and initiates a location, and a resumption of work between the initiatory and final acts of location is of no avail, since the acts required in the location of a claim are distinct, and all must be performed before a legal location exists.
8. Plaintiff located a mining claim on ground which a third person had located the year before. Subsequently defendant entered and filed a notice of location on the same claim, but owing to defects therein he afterwards filed an amended notice, and meanwhile plaintiff had resumed work. *Held,* that as there was a question as to whether the claim by the third person was a valid and subsisting one when plaintiff entered, in which case plaintiff's location was void and defendant's title was good, the amended notice filed by defendant was admissible in evidence.

Appeal from District Court, Madison County; M. H. Parker, Judge.

Action by Alexander McKay against William J. McDougall. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Mr. Lew L. Callaway, for Appellant.

Mr. W. A. Clark, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

Action by plaintiff for damages for alleged trespasses upon the Shoo Fly Gulch placer claim, situate in Madison county, for a perpetual injunction restraining defendant from further trespassing thereon, and for a decree quieting plaintiff's title. The defendant denies plaintiff's title, sets up a counterclaim alleging title in himself, and demands judgment for damages and for injunction.

The opinion rendered on a former appeal, reversing a judgment in favor of the defendant herein and remanding the cause, is reported in 19 Montana, at page 488, 48 Pac. 988. The pleadings having been amended to conform to the suggestions made by this Court in that opinion, a trial was had upon the

merits, resulting in a verdict for the defendant for $1,800. Judgment was entered for this amount and for costs, and also perpetually enjoining the plaintiff from asserting any claim to the ground in controversy. From this judgment and an order denying a motion for a new trial, plaintiff has appealed.

At the trial the plaintiff rested his claim of title upon a location of the ground in controversy as the Shoo Fly Gulch placer claim, made by himself and one Thurgood in July, 1877. A notice or declaratory statement of this location was filed for record with the clerk of Madison county on July 22. It was signed by both locators, but was not verified. Plaintiff thereafter by *mesne* conveyances, acquired Thurgood's interest. The defendant, denying any title in plaintiff, claimed title under a location called the "Humbug Placer," made on July 22, 1893, a notice of which was recorded on August 9, 1893, and an amended location made on September 1, 1894. The three contentions made at the trial were upon the questions whether the ground in controversy was subject to location at the time plaintiff's location was made, whether the plaintiff had failed to represent the Shoo Fly Gulch claim during the year 1892, and whether the plaintiff resumed work before defendant located the ground as the Humbug Placer, either by what he did on the ground in 1893, or by his amended location made in 1894. All these questions were fairly within the issues made by the pleadings, as appears from a synopsis of them set out in the statement preceding the opinion on the former appeal, and the integrity of the judgment of the district court turns upon the correctness of the instructions submitted to the jury upon these issues.

1. Evidence was introduced tending to show that the ground in controversy was located as a placer claim by one Sholes and others in June, 1876. Sholes himself, who testified in the case, stated that he saw the plaintiff upon the ground early in 1877, but that as his time had not expired he was not uneasy. In another place in his testimony he says that while he and his associates worked in the neighboring gulches until 1880, when

he sold out, they never did any work upon the ground claimed by plaintiff in the way of mining, except "to represent the gulch." From other evidence in the case it appeared that there was not water enough in the gulch for mining purposes, and that all the work done there subsequently was by means of water brought in from other sources. There was also some evidence from which it might be inferred that work had been done upon the ground in 1869, but that none had been done thereafter until plaintiff made his location. There is no other evidence in the record that Sholes and his associates did any work upon the claim at any time after the date of their location. Upon this evidence the court, after stating correctly to the jury the steps necessary to make a valid location of a placer claim in 1876, instructed them as follows: "And if you find from the evidence that the said Clark M. Sholes and his associates in June, 1876, did make a discovery of placer gold on the unoccupied lands of the United States, and on the premises in controversy, and did make a location thereof, and mark the boundaries thereof so that they could be readily traced, then the court instructs you that as a matter of law the said Sholes and his associates were the owners of and entitled to the possession of said claim against all the world, and were in law in possession thereof, so long as they complied with the laws of the United States; and any location placed thereon or attempted to be put upon said premises by the plaintiff while such prior location was valid and subsisting was a nullity and conferred no rights upon plaintiff, and he would be a trespasser, under the law, unless you further believe from the evidence that the said Clark M. Sholes and his associates abandoned said placer claim and left the same without any intention of returning thereto prior to July, 1877, when the plaintiff, McKay, claims to have made his location thereof." Upon the facts in evidence before the jury upon this branch of the case, this instruction was clearly misleading. For, while failure to represent a mining claim, with other facts showing intention, may leave room for an inference of abandonment by the locator,

there may be a forfeiture of all right by the mere failure where the intention to abandon does not exist. Abandonment, as applied to mining claims held by location merely, takes place only when the locator voluntarily leaves his claim to be appropriated by the next comer, without any intention to retake or claim it again, and regardless of what may become of it in the future. A forfeiture takes place by operation of law, without regard to the intention of the appropriator, whenever he neglects to preserve his right by complying with the conditions imposed by law; that is, to make the required annual expenditure upon the claim within the time allowed. The former involves an inquiry of fact as to the intention as well as the act; in regard to the latter the inquiry is: Has the required expenditure been made as the law commands? We are of the opinion that while there is, perhaps, sufficient evidence upon which to base an inference that Sholes and his associates had abandoned their claim at the time plaintiff's location was made, the question whether they had forfeited their rights by failure to represent the claim before that time was also fairly presented, and should have been submitted to the jury under proper instructions. The paragraph quoted is correct upon the question of abandonment, this term being clearly defined in a following paragraph; but it should have gone further, and submitted, also, the question of forfeiture. The logical effect of it is to exclude this question from the consideration of the jury altogether. In this connection the court should also have laid down the correct rule as to the time within which Sholes and his associates were obliged to do their annual representation work in order to save a forfeiture. Under the act of congress of May 10, 1872 (17 Stat. at Large, 92, Sec. 5), the year within which the required expenditure must be made upon all claims theretofore or thereafter located was computed from the date of the respective locations. As to claims located prior to the passage of that act the rule was changed by acts of congress of March 1, 1873, and June 6, 1874, respectively (17 Stat. at Large, 483; 18 Stat. at Large, 61), so that after January 1,

1875, the year was computed from the 1st day of January in each year. As to claims located after May 10, 1872, the rule remained as provided in the act of that date until the act of congress of January 22, 1880 (21 Stat. at Large, 61), which so amended the act of May 10, 1872, as to permit the time of representation to be computed from the 1st day of January "succeeding the date of location," and the provision was made applicable to all claims, whether located before or after the amending act. (Lindley on Mines, Sec. 621; *Hall* v. *Hale,* 8 Colo. 351, 8 Pac. 580; *Belk* v. *Meagher,* 104 U. S. 279, 26 L. Ed. 735.) The court having already, in another paragraph of the instructions, laid down the rule correctly as to when the representation should have been done by the plaintiff in order to prevent a forfeiture in 1892, the jury, in the absence of the specific instruction as to the rule applicable in 1876-77, were doubtless led to infer that the same rule applied in both cases. Under this view the jury might well conclude that the location made by plaintiff in July, 1877, was void from the beginning, because it was made on land still subject to the claim of Sholes and his associates, whereas, from the evidence, and under a proper instruction, they might have reached the conclusion that the Sholes location was forfeited for want of representation prior to the end of June, 1877.

In what we have just said with reference to the Sholes location we have proceeded upon the assumption that there was evidence enough to go to the jury upon the question whether the acts done upon the ground by Sholes and his associates in June, 1876, made it a valid location. At that time the statute of the territory of Montana requiring a record of a verified notice or declaratory statement of location did not include placer claims. It applied only to lode locations until the passage of the act of March 5, 1883 (Session Laws 1883, p. 95), which was amendatory of the Revised Statutes of 1879, and made all locations subject to the same rule. In the absence of a statute making additional requirements, or a local rule or custom (and none was proven in this case), a compliance with the statutes

of the United States as to discovery and marking of the boundaries was sufficient. It was for the jury to say whether the evidence showed such a compliance, though the monuments put upon the ground to indicate the exterior boundaries were few and placed at great intervals. The court could not say, as a matter of law, that the facts did not show a valid location.

2. It was also a question for the jury, upon the evidence, whether the plaintiff had suffered a forfeiture of his rights by a failure to represent his claim in 1892, as well as whether he had resumed work in good faith before the Humbug Placer was located. The plaintiff contends that it is shown by uncontradicted evidence that he did several hundred dollars worth of work on his claim in 1892. He also asserts that, if it be conceded that he did no work at all during that year, yet there is no controversy but that the evidence shows that he resumed work in good faith before the defendant made any location. As to work done in 1892 plaintiff's position is sustained by his own testimony; on the other hand, the testimony of the defendant tends to show that plaintiff did no work at all, but that the excavation and removal of dirt from the gulch, which plaintiff claims to have done by the use of water from a ditch passing round the head of the gulch to other claims, was done by waste water from this ditch or by a cloudburst long before 1892, and that plaintiff had nothing whatever to do with it. There was thus a direct and substantial conflict in their statements. There is, however, no substantial conflict in the evidence introduced by the plaintiff to show that he did a large amount of work upon the claim in 1893, after the defendant entered thereon, and during 1894, prior to September 1st. Indeed, a considerable portion of the judgment recovered by the defendant was for gold taken out by the plaintiff between July 22, 1893, and September 1, 1894, the date of defendant's amended location. The facts connected with defendant's location are that he entered upon the land in July, 1893. Having found gold, he marked the boundaries of his claim running up the gulch with monuments, which the jury evidently found

sufficient to identify the claim. Thereupon he filed his notice for record with the county clerk, but it was not verified as required by the statute, and was defective in other particulars. After this suit was begun by plaintiff, and after plaintiff had commenced to "work the mine thoroughly," as he says, the defendant filed his amended notice of location. This amended notice was sufficient in substance, and would, in the absence of any other rights, establish defendant's title to the Humbug Placer. The question, therefore, is: Did plaintiff's resumption of work, and its continuance thereafter, prevent a forfeiture in favor of the defendant's location initiated before a resumption of work, but not completed until some fourteen months after? The trial court was of the opinion that it did not, as appears from the following instruction submitted to the jury upon this branch of the case: "The court instructs the jury that, in order to prevent a forfeiture for failure to perform assessment work required by law, the claimant must resume in good faith, and prosecute the same continuously and without unreasonable interruption until the full amount of labor is performed. Nothing less than the outward manifestation of intent to atone for the delinquency by diligent continuous prosecution of substantial and valuable development work will satisfy the law; that, while the claim will be protected from relocation so long as the claimant is actually engaged in making up the deficiencies, a suspension of work for any appreciable period before the full amount required has been performed will subject the claim to relocation, and the right to resume work is lost, where a qualified relocator enters and initiates a location, and a resumption of work upon a claim between the initiatory and final acts of relocation is of no avail. And if you believe from the evidence in this case that the plaintiff had failed to represent said placer claim for the year 1892, and that the defendant entered upon said premises and proceeded to initiate a relocation thereof prior to the plaintiff commencing work, then any work done by the plaintiff after the initiation of said relocation will not avail him or save his rights in the premises,

and you must find for the defendant." This paragraph, except the last sentence, is taken from the text of Mr. Lindley, on pages 825, 826. While we agree that it states the law correctly as to good faith and diligence in the prosecution of the work after resumption, we dissent from this learned author's view that work may not be resumed after the entry of the relocator and the initiation of the second location, so as to save the forfeiture. Whatever may be the rule in other jurisdictions, under local statutes requiring work of considerable amount to be done by the relocator in order to complete his relocation, which is also the case under our present statute (Political Code, Sec. 3615), the rule applicable under the statute in force in this state until July 1, 1895 (Compiled Statutes of 1887, Fifth Division, Sec. 1477), is stated in *Gonu* v. *Russell,* 3 Montana, 358, as follows: "The law contemplates that the location of a mining claim shall consist of a number of distinct acts, which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists. The owner of the lode which has become subject to relocation can resume work thereon at any time prior to the performance of all these acts. The appellant could not make a valid location of the Empire lode until he had marked the boundaries so that they could be traced readily by means of stakes, monuments, natural objects, or any other certain means. The resumption of labor in good faith by the respondent before the appellant perfected his location rendered null the prior acts of the appellant." The rule as thus stated necessarily results from the signification given to the term "location" used in the statute (Rev. St. U. S. Sec. 2324). The territorial supreme court understood it in its broadest sense, comprehending all the several steps necessary to make a complete location. Under the rule adopted by other courts, and as stated by Mr. Lindley *supra,* the term is held to mean the initiation of a location by entry and performance of the first necessary step. While there is much to be said in favor of this latter view, the argument is not so overwhelming that we feel justified in departing from the rule as laid down in *Gonu* v. *Russell.*

In the first paragraph of this opinion we spoke generally of a forfeiture as the result of a default on the part of the first locator. Speaking accurately, it is only by a complete relocation by another after default of the first locator that a forfeiture is wrought. This statement is fully in accord with Mr. Lindley's view in his text, at page 820, and it is the only logical view. It will not be contended that if A., for example, enters upon a claim located by B., which is subject to forfeiture, with the intention to relocate it, and takes one or more of the necessary steps to that end, but abandon's his purpose before he completes the relocation, B.'s rights will be thus effectually forfeited. If congress had intended this, the idea would doubtless have been expressed by use of some other term less comprehensive in meaning than the term "location." The rule as stated in *Gonu* v. *Russell* is therefore logical and sound. In any event, we do not feel disposed to reject it, especially in view of the fact that it has so long stood as the rule in this jurisdiction, and impliedly at least has twice been approved by this Court. (*Honaker* v. *Martin,* 11 Mont. 91, 27 Pac. 397; *Hirschler* v. *McKendricks,* 16 Mont. 211, 40 Pac. 290.)

The location of the defendant, which was not completed until September 1, 1894, did not cut off the right of plaintiff to resume work at any time prior to that date, provided his location was valid in the first instance and had not been abandoned, and provided, also, that under the rule in *Honaker* v. *Martin* and *Hirscler* v. *McKendricks* he diligently prosecuted the work without unreasonable interruption until the full amount was performed. Of course, if upon another trial it should appear that the plaintiff abandoned his location at any time before July, 1893, he would have no right to the ground whatever.

3. Plaintiff contends that the trial court erred in overruling his objection to the introduction in evidence of a copy of defendant's amended notice of location. Upon the theory that the Sholes location was a valid, subsisting one at the time plaintiff entered and made his location, the latter was void *ab initio*

and imparted no title. In that case defendant's title would be good. His record of September 1, 1894, cured all defects in the original notice, and made the location valid except as to intervening rights.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

YELLOWSTONE NATIONAL BANK OF BILLINGS, APPELLANT, *v.* GAGNON, RESPONDENT.

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27 256
25 268
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(No. 1,292.)

(Submitted March 20, 1901. Decided April 15, 1901.)

Appeal and Error—Bill of Exceptions—Amendments—Incorporation—Necessity—Signing—Time—Law of the Case—Findings—Objection—Exceptions—Review.

1. Where proposed amendments of a bill of exceptions, which were allowed, were not incorporated in the bill, but only appeared in the transcript, they cannot be considered on appeal, since they are not part of the record.
2. Where proposed amendments to a bill of exceptions, which were allowed by the court, were not incorporated therein, such bill of exceptions will be disregarded on appeal, since the proposed bill and amendments were both necessary to constitute a bill of exceptions.
3. The trial judge should not certify to the correctness of a proposed bill of exceptions and amendments thereof until after both have been engrossed.
4. Where, on a prior appeal, defendant's answer was held to state a defense, plaintiff cannot subsequently raise the question that it does not.
5. In the absence of a compliance with the requirements of Secs. 1114, 1115 of the Code of Civil Procedure, a judgment will not be reversed on appeal though the express findings do not support it, since in such case the presumption obtains that the court impliedly found for the prevailing party upon the issues of fact not covered by the express findings.
6. Where there is no bill of exceptions (or new trial statement) on appeal, the evidence cannot be examined to ascertain whether it tended to prove the facts found or warranted the court's decision.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by the Yellowstone National Bank of Billings against E. H. Gagnon. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Mr. Gib A. Lane, for Appellant.

Mr. O. F. Goddard, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

The plaintiff has appealed from the final judgment in an action upon promissory notes executed by the defendant.

1. A paper entitled "Bill of Exceptions" is by copy included in the transcript. Appended to it is the following certificate by the judge who tried the cause: "The foregoing bill of exceptions is signed, settled and allowed by me this 27th day of June, A. D. 1898, together with the proposed amendments of defendant." Counsel for the plaintiff, while conceding that the amendments offered by the defendant were allowed, but were not incorporated into the bill, asserts that since they appear in the transcript the court should consider them in connection with the supposed bill. This we may not do. It is true that there is copied into the transcript a paper purporting to embrace the amendments proposed by the defendant and allowed by the judge, but it is no part of the record on appeal. It is not included within any bill of exceptions or statement on motion for a new trial, nor is it one of the papers which Section 1196 of the Code of Civil Procedure designates as part of the judgment roll; neither is it required by Section 1736 of the Code of Civil Procedure to be furnished to this Court on appeal; hence we cannot look to it for any purpose. What the amendments are, or whether the matter therein contained be material or immaterial, relevant or irrelevant, we have no means of determining. They must be disregarded. We have, then, the certificate of the judge to the effect that the bill of exceptions proposed by the plaintiff, together with the

defendant's amendments proposed thereto, are settled, but what the amendments are is not disclosed, and it is apparent that the amendments are not in the bill. The proposed bill and the amendments—not one, but both—were necessary to constitute a bill of exceptions. The judge should not, in any event, have made the certificate he did, nor should he have certified the supposed bill to be correct until after the amendments were incorporated. He ought not to have given any certificate before engrossment. Although there is in Subdivision 3 of Section 1173 of the Code of Civil Procedure an express provision requiring proposed statements on motions for a new trial and the amendments to be engrossed, no such provision is made, so far as we are advised, in respect of bills of exceptions; but the bill and amendments, when settled, must nevertheless be engrossed, in order to constitute such a bill of exceptions as is contemplated by the law. The amendments allowed must be inserted, and the proposer of the bill must see that this is done. Such has always been the rule and practice in the territory and state of Montana. Nothing in *Wulf* v. *Manuel,* 9 Montana, 276, 23 Pacific Reporter 723, nor in *Penn Placer Mining Company* v. *Schreiner,* 14 Montana 121, 35 Pacific Reporter 878, indicates anything to the contrary. The so-called bill of exceptions must also be disregarded.

2. Having eliminated the supposed bill of exceptions, nothing remains for our consideration except the judgment roll.

Counsel for the plaintiff contends that the answer fails to state facts sufficient to constitute a defense or counterclaim to the second cause of action alleged in the complaint. That question was determined adversely to the plaintiff upon the former appeal in this case, the opinion being reported in 19 Montana, on page 402, (61 Am. St. Rep. 520, 48 Pac. 762). This Court there held that the answer in the respect mentioned does state a defense, and it matters not what view may now be taken of the correctness of the decision, for the law of the case was declared, and it is binding upon this Court as well as upon the court below.

3. The court, without a jury, tried the cause, and made certain express findings of fact, which in and of themselves do not support the judgment. But Sections 1114 and 1115 of the Code of Civil Procedure are as follows: "Sec. 1114. No judgment shall be reversed on appeal for want of findings at the instance of any party who, at the close of the evidence and argument in the cause, shall not have requested findings in writing and had such request entered in the minutes of the court; nor in cases tried by the court shall the judgment be reversed on appeal for defects in the findings unless exceptions be made in the court below for a defect in the findings or in a finding. Sec. 1115. In cases of exceptions for defective findings, the particular point or issue upon which the party requires a finding to be made, or the particular defect to be remedied, shall be specifically and particularly designated; and upon failure of the court to remedy the alleged defect, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases." It does not appear that the plaintiff either requested findings in writing or filed exceptions for defective findings. In this state the system of implied findings prevails (*Gallagher* v. *Cornelius,* 23 Mont. 27, 57 Pac. 447; *Haggin* v. *Saile,* 23 Mont. 375, 59 Pac. 154), and, in the absence of a compliance with the requirements of the sections quoted, the presumtion obtains that the court impliedly found for the prevailing party upon the issues of fact not covered by the express findings. Unless the party seeking a reversal has followed the course prescribed by sections 1114 and 1115, the express findings are supplemented by implied findings. So considered, the findings in this case are responsive to the issues, and support the judgment.

Owing to the want of any bill of exceptions, the evidence cannot, as we have said, be examined for the purpose of ascertaining whether it tended to prove the facts found or warranted the court in making the decision. For the same reason, the question whether the court erred in sustaining the defendant's motion for the judgment that was rendered cannot be determined.

The judgment will be affirmed, and it is so ordered. *Remittitur* may issue forthwith.

Affirmed.

MR. JUSTICE MILBURN, having presided as judge in the court below upon the first trial of the cause, did not hear the argument on the present appeal, and does not participate in the foregoing opinion.

ACKLEY, RESPONDENT, *v.* PHENIX INSURANCE COMPANY, APPELLANT.

(No. 1,289.)

(Submitted March 19, 1901. Decided April 15, 1901.)

Insurance — Pleading — Contracts — Condition — Breach— Interpretation—Trial by Referee—Restricting Cross-Examination—Harmless Error—Recovery—Amount.

1. Under Code of Civil Procedure, Sec. 746, declaring that in pleading performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, a complaint in an action on a fire policy sufficiently alleges performance of a condition precedent in the policy, requiring loss to be ascertained by arbitrators in case of disagreement, when it alleges generally that plaintiff has duly performed all the conditions of the policy on his part.
2. Since a policy insuring "articles usually kept for sale in retail drug stores" covers gasoline, benzine and ether, the keeping of such articles in reasonable quantities on the insured premises is permitted, and will not avoid the policy, though a printed condition therein declares in effect that, unless otherwise provided by agreement indorsed thereon or added thereto, the policy shall be void if there be kept benzine, ether or gasoline, notwithstanding any custom or usage of trade may permit them to be kept.
3. Error of a referee in unduly restricting cross-examination of a witness was not prejudicial when the testimony sought to be elicited was covered substantially by subsequent testimony from the same witness on cross-examination.
4. A decision by a referee allowing a recovery on a fire policy, without any deduction on account of a prior loss for which proof had been made, was not erroneous, where there was no evidence of the amount of the prior loss or that it had been adjusted and paid.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Libbie L. Ackley against the Phenix Insurance Company of Brooklyn, N. Y. From a judgment for plaintiff, and from an order refusing a new trial, defendant appeals. Affirmed.

Mr. Thomas E. Brady, for Appellant.

Under the provisions and conditions of the policies, which appear in and are made a part of the complaint, it was necessary for plaintiff to allege in her complaint either that there was an appraisement and award or that the submission to appraisement was waived or prevented by the defendant. (*George Dee & Sons Co.* v. *Ins. Co.,* 104 Iowa 167; *Hamilton & Home Ins. Co.,* 137 U. S. 370; Ostrander on Fire Insurance, 2d Ed. Sec. 258.) The keeping of benzine, gasoline and ether was a violation of the express terms of the policies and rendered them void. (*Steinbach* v. *Ins. Co.,* 13 Wall (U. S.), 183; *Lancaster Ins. Co.* v. *Lenheim,* 89 Pa. St. 479; *Fischer* v. *London & Lancashire Fire Ins. Co.,* 83 Fed. Rep. 807; *Franklin Ins. Co.* v. *Yidegraff,* 43 Penn. St. 350; *Phoenix Ins. Co.* v. *Fleming,* 65 Ark. 54; *Yoch* v. *Home Ins. Co.,* 111 Cal. 503.) The written part of the policies control the printed part only where they are inconsistent with each other (Sec. 3138 Code of Civil Procedure), but they are not inconsistent in this case. Section 2206 of the Civil Code provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (And see Sec. 3134 Code of Civil Procedure.) Under these statutes the provisions of the policies prohibiting the keeping of benzine, gasoline, etc., cannot be ignored. They were left in the policies as part of the contract. They must be given effect if reasonably practicable. This can be done by construing the policies to mean that the plaintiff could keep all things, other than benzine and the other prohibited articles, which are

usually kept in drug stores, but that she could not keep the prohibited articles. That is the only reasonable construction which can be given to the contracts under the statute and the only way in which all the parts can be given effect. If the insured wished to keep benzine or any thing else the policy could easily have been made to say so.

Mr. James Donovan and *Mr. N. W. McConnell,* for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This was an action to recover $2,650 on two policies of insurance issued by the defendant to the plaintiff upon "her stock of drugs, oils, paints, glass, fancy articles, patent medicines, wall paper, liquors, and other articles usually kept for sale in retail drug stores," and "her store furniture and fixtures, including counters, shelving and showcases," and "her one-story frame, shingle-roof building occupied as a drug store, situate on the premises of the assured in the town of Sand Coulee, Cascade county, Montana." The policies insured the plaintiff to an amount not exceeding $1,650 upon her stock of merchandise and fixtures, and to an amount not exceeding $1,000 on the building. The complaint states that the plaintiff was the owner of the property insured; that the defendant issued the policies, which are pleaded by copy; that on the 4th day of February, 1897, the property was totally destroyed by fire, and at the date of the loss was of the actual cash value of $4,600; that plaintiff's loss under the policies was $2,650; that the plaintiff, immediately after the loss, and more than sixty days prior to the commencement of the action, notified the defendant thereof, and furnished it with written proof of the loss; that the plaintiff has duly performed all the conditions on her part to be performed; that the sum of $2,650 is due and unpaid from the defendant to the plaintiff; and that the defendant refuses to pay that or any other sum. In its answer

the defendant denies the plaintiff's ownership of the property, and alleges that the property was nominally conveyed to the plaintiff for the use and benefit of one McCann, who was at all times the sole owner; that the actual cash value of the personal property destroyed was not in excess of $100, and that the building, at the time of the fire, did not exceed in value the sum of $200; that in August, 1896, a partial loss occurred under one of the policies, by a fire which destroyed some of the goods described therein, which loss was adjusted, and plaintiff paid thereon $94.06, and that such payment was made to the plaintiff without any knowledge on the part of the defendant at that time that plaintiff was not the real owner of the property, and that the liability, if any, under one of the policies, had thereby been reduced to the extent of $94.06. The defendant denies that the plaintiff duly performed all the conditions on her part to be performed, as imposed by the terms of either policy, specifying that the failure consisted in this: that she knowingly kept in stock in the building insured during the lifetime of the policies, and had therein at the time of the fire, a considerable quantity, consisting of between five and ten gallons, of gasoline, and between five and ten gallons of benzine, also a considerable quantity of ether, contrary to the express provisions and terms of the policies, by reason of which the risk was largely increased to the defendant, and whereby the plaintiff rendered void the policies. Defendant also pleaded that the policies provided that the company should not in any event be liable for an amount greater than three-fourths of the cash market value of the property at a time immediately preceding the loss or damage by fire. The contents of the pleadings need not be further stated.

By consent the cause was sent to C. H. Benton, Esq., as referee. He found the issues for the plaintiff, and reported a judgment for $2,650 against the defendant. In accordance with the report, judgment was entered, and from it, and an order refusing a new trial, the defendant appeals.

1. The first point urged by the defendant is that the com-

plaint does not state facts sufficient to constitute a cause of action. Counsel argues that it does not appear from the policies or from the facts alleged in the complaint that the defendant assumed any obligation toward the plaintiff which it failed to perform. Each policy contains the following: "This company shall not be liable beyond he actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. * * * In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. * * * No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements. * * *"

Counsel says that under these provisions the complaint must state either that there was an appraisement or award, or that a submission to appraisement was waived or prevented by the defendant. Assuming that the complaint must, in substance,

contain the statements which the defendant asserts have been omitted, we are clearly of the opinion that in this regard the complaint is not obnoxious to the objection now interposed, for the plaintiff therein alleges that she has duly performed all the conditions of the contracts on her part. Section 746 of the Code of Civil Procedure declares that in pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and, if such allegation be controverted, the party pleading performance generally must on the trial establish the facts. The plaintiff in this case chose to avail herself of the privilege granted by this section, and the defendant did not by its answer controvert the allegation, except with respect to the keeping by the plaintiff of certain prohibited articles in the insured building,—we remark, in passing, that the defendant misapprehends the scope of the allegation that the plaintiff had duly performed all the conditions upon her part; it was not necessary for her to plead in the complaint that she had not kept the articles prohibited, and hence that she had not done so was not, as matter of pleading, the performance of a condition precedent; the allegation of due performance included the performance of conditions precedent only, and that she kept the articles forbidden was matter of affirmative defense, and no part of the statement of the plaintiff's cause of action. Without considering what effect a denial by the defendant of any liability might have upon the arbitration and award clauses, without considering whether the complaint states a denial by the defendant of any liability, and without deciding whether such denial, if pleaded, would obviate the necessity of alleging compliance with the arbitration clauses, suffice it to say that the defendant, by failing to deny, admitted that the plaintiff complied with the requirements of the policies touching arbitration and award.

2. Each policy declares that the defendant insures the plaintiff against loss or damage by fire, "except as hereinafter pro-

vided," and contains, among others, the following printed provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, * * * ether, * * * gasoline. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The provisions quoted appear and are part of the printed forms upon which the policies were made out. The description of the subject-matter of the risk, specified as plaintiff's "stock of drugs, oils, paints, glass, fancy articles, patent medicines, wall paper, liquors and other articles usually kept for sale in retail drug stores," is typewritten, and was attached to the policies in the places left for the insertion of the description. The defendant averred that the plaintiff, contrary to the terms of the policies, kept in stock gasoline, benzine and ether. At the trial it was shown that when the fire occurred there were in stock four pounds of ether, five gallons of benzine, and not more than ten, nor less than five, gallons of gasoline. The defendant insists that there was no evidence tending to prove that ether, benzine and gasoline are articles usually kept for sale in retail drug stores, but we are satisfied that the evidence did tend to prove that the three articles named are usually kept for sale

in retail drug stores, and that the plaintiff kept them for that purpose. The testimony of the witness McCann was manifestly to that effect, although the question propounded to him upon the subject, if considered apart from the context, is not free from ambiguity. No effort was made to show that the articles were kept in excessive quantities. Under the evidence, the referee was justified in finding that gasoline, benzine and ether were articles usually kept for sale in retail drug stores. Did the keeping of these by the plaintiff for that purpose avoid the policies? We are of the opinion that it did not.

The provisions quoted did not constitute an absolute prohibition against the keeping of benzine, ether or gasoline. In its printed part each policy declares, in effect, that, unless otherwise provided by agreement indorsed thereon or added thereto, it shall be void if there be kept benzine, ether or gasoline, notwithstanding the fact that any usage or custom of trade or manufacture may permit them or any of them to be kept; and each policy is declared to be made and accepted subject to this stipulation and condition, together with such other provisions, agreements or conditions as may be indorsed thereon or added thereto. In accordance with the terms of the printed part of each policy there was added an agreement in writing by which the defendant insured, and the plaintiff accepted insurance upon, articles usually kept for sale in retail drug stores. This agreement is in no wise repugnant to the inhibition against the keeping of benzine, gasoline or ether, for the keeping of these articles is prohibited unless the parties otherwise agree. They did otherwise agree, and the agreements must be held to be agreements attached to the policies "which removed the exemption from liability which would otherwise have existed." (*Yoch* v. *Home Mutual Insurance Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857, and authorities there cited; and cases cited in note to *Lancaster Fire Insurance Co.* v. *Lenheim,* 33 Am. Rep. 781.) The true meaning of the prohibitory provision seems to be that the keeping of any of the articles named, though kept in accordance

with the usage or custom of trade or manufacture, will avoid the policy, unless an agreement be attached to the policy providing otherwise; a paraphrase of the provisions being: In the absence of an agreement, attached to or indorsed on the policy, by which gasoline, benzine and ether are permitted to be kept, the keeping of these articles will render the policy void, notwithstanding the fact that, by the usage or custom of trade or manufacture, such articles may be kept. The provision was designed to prohibit under all circumstances, save when an agreement to the contrary is indorsed on or attached to the policy, the keeping of the articles named. There is upon the face of the policy no conflict or repugnancy between its different provisions, nor do we think that the evidence discloses any repugnancy. The written parts of the policies described the subject of the risk as articles usually kept for sale in retail drug stores, and the evidence discloses that gasoline, benzine and ether fall within the description. These articles were covered by the insurance so long as they remained in the stock of goods; hence the defendant agreed to except them from the qualified or conditional inhibition, and to permit them to be kept by the plaintiff without thereby avoiding the policies. In promising to insure and insuring articles usually kept for sale in retail drug stores, the defendant must be presumed to have known that gasoline, benzine and ether were so kept (the evidence proving that they were), and that they were or might be kept by the plaintiff, and, consequently, that its policies covered or might cover them. Whether these articles were usually so kept was, of course, a question of fact to be determined upon evidence. The defendant, by writing into the policy the subject matter of the risk, to-wit, "articles usually kept for sale in retail drug stores," must be deemed to have intended thereby to insure all such articles as are usually kept for sale in such stores, and this agreement must be held to be an agreement added to the policy. (*Yoch* v. *Home Mutual Insurance Co., supra.*) Counsel for the defendant contends that, under Section 2206 of the Civil Code, the provisions of

the policies prohibiting the keeping of benzine, gasoline and ether cannot be ignored, and that, since they were left in the policies as parts of the contracts, they must be given effect if reasonably practicable. He argues that this can be done by construing the policies to mean that the plaintiff could keep all things, other than the prohibited articles, which are usually kept in retail drug stores, but that she could not keep the prohibited articles. The views which we have expressed dispose of this suggestion; we add, however, that the interpretation for which counsel contends is based upon an assumed repugnancy, and, if adopted, would destroy, in part, the written agreement, which must prevail over any printed agreement repugnant thereto. It would be in disregard, also, of Section 2217 of the Civil Code, for the reason that, if effect were given to the printed clause which is asserted to be repugnant to the written one, the general intent and purpose of the contract, viewed as a whole, would be subordinated to the printed clause assumed to be repugnant. The conclusion seems to be irresistible that that the defendant intended to insure the plaintiff against loss or damage by fire of or to articles kept by the plaintiff in her drug store, including gasoline, benzine and ether, and that the intention of the plaintiff was to have these things covered by the policies.

3. Much of the brief in behalf of the defendant is devoted to an argument by which it is sought to be shown that the plaintiff failed to prove by competent evidence how much, if any, damage she sustained by the loss of the property, and that the evidence is insufficient to justify the finding that three-fourths of the cash value of the property was the sum of $2,650. Careful and repeated examinations of the evidence satisfies us that the witnesses were qualified to testify touching the value of the property destroyed, and that the evidence sustains the findings, both express and implied.

4. It is contended that the referee erred in not permitting proper cross-examination of the witness McCann in respect of his interest in the insured property and the result of the

suit. One of the questions propounded had a double aspect, and we think there was no error committed in ruling it out upon that ground. Proper questions, however, were put, and the cross-examination in the particular adverted to was unduly restricted, but the error became nonprejudicial by subsequent testimony from the same witness on cross-examination covering substantially the material matter which by proper questions was sought to be elicited on the former cross-examination.

5. The only remaining specification of error which deserves mention is that the findings and judgment are for the full amount of the face of the policies, without deduction on account of a prior fire which consumed part of the insured property, and for which proof of loss had been made by the plaintiff. Although the defendant, in its answer, averred that a part of the property insured had been destroyed by a fire in August, 1896, and that the loss thereby was adjusted, and $94.06 paid to her by the defendant, there was nothing shown upon the trial with respect to the amount of the loss, or what sum, if any, was paid. It appeared, incidentally, that there was a fire in August, 1896, which destroyed some of the property, and that the plaintiff made proof of loss; further than this the evidence is silent. It is obvious, therefore, that the position of the defendant is untenable.

The judgment and the order denying the motion for a new trial are affirmed.

Affirmed.

SHERMAN, RESPONDENT, *v.* NASON, APPELLANT.

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(No. 1,320.)

(Submitted April 16, 1901. Decided April 22, 1901.)

Limitations—Statutory Change—Limitations Already Running—Unreasonable Limitation—Suit Within Reasonable Time—Appeal—Reversal—Remand.

1. Laws of 1889, p. 172, provides that an action on an account, not founded on a written instrument signed by the party chargeable therewith, shall be commenced within five years. Code of Civil Procedure, Sec. 514, Subd. 1, which took effect July 1, 1895, declares that actions of that nature shall be commenced within three years. Section 3456 provides that, when a limitation prescribed in any existing statute has begun to run before the Code takes effect, the time which has already run shall be deemed part of the time prescribed as such limitation by the Code. *Held,* that suit commenced December 29, 1897, on an open account not founded on a writing, due December 31, 1892, was barred by limitations, notwithstanding the period of six months after July, 1895, allowed by the Code within which to commence suit, was unreasonably short, since suit was not commenced within a reasonable time thereafter.
2. Upon the reversal of a judgment the Supreme Court will remand the cause for a new trial.
3. The only exceptions which may be considered on appeal are those preserved by the appellant.

Appeal from District Court, Madison County; M. H. Parker, Judge.

ACTION by W. P. Sherman against Richard Nason. From a judgment for plaintiff, defendant appeals. Reversed.

Mr. Lew L. Callaway and *Messrs. Bender & Alley,* for Appellant.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This action was brought to recover judgment for $262 (including interest) upon an open account for goods, wares and merchandise alleged to have been furnished by the assignor of the plaintiff to the defendant on the 31st day of December,

1892. We notice that the complaint specifies, "Mass at church, $20," as an item of the "goods and merchandise" which the plaintiff's assignor "furnished to defendant at his special instance and request;" but as the defendant is seemingly content with the description, and has not questioned its legal accuracy, we make no comment thereon, and do not decide whether the item is included in the phrase "goods and merchandise." The complaint, which was filed on the 29th day of December, 1897, states, in substance, that the debt became due and payable on the 31st day of December, 1892. One of the defenses pleaded is that the cause of action is barred by the provision of Subdivision 1 of Section 514 of the Code of Civil Procedure. At the trial the plaintiff established by proof the matter stated in his complaint. Thereupon the defendant moved for a nonsuit and that judgment be rendered for him, upon the ground that the cause of action alleged was barred by the provision of the statute pleaded in the answer. The motion was overruled, defendant declined to introduce any evidence whatever, and the court instructed the jury to find for the plaintiff. A verdict for the amount stated in the complaint having been returned, judgment was entered in accordance therewith, and the defendant has appealed. The plaintiff has not filed a brief or made any argument in this Court.

Upon the present appeal there is but one question involved,—that of the statute of limitations. The cause of action accrued on December 31, 1892. The account upon which the action was commenced was not founded on an instrument in writing. The complaint was filed on December 29, 1897. At the time the cause of action accrued, and until July 1, 1895, the period prescribed for the commencement of an action upon an account not founded upon a written instrument signed by the party chargeable therewith, was five years (Laws of 1889, p. 172). The Code of Civil Procedure of 1895 became operative on July 1, 1895. Subdivision 1 of Section 514 of that Code prescribes that an action such as the one at bar shall be commenced within three years after the cause of action has accrued. Sec-

tion 3456 of the same Code declares that "when a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code." By Section 3483 of that Code, the act of 1889, which prescribed the period of five years, was repealed, subject to the provisions of Section 3456, *supra*. It appears, therefore, that from December 31, 1892 (when the cause of action accrued), to July 1, 1895, the period prescribed for barring the remedy of the plaintiff was five years, and that from July 1, 1895, to December 29, 1897 (when the action was commenced), such period was three years; so that the plaintiff and his assignor had two years, six months and one day within which to commence an action before the taking effect of Section 514, *supra*, and had six months (less one day) further time after July 1, 1895, when the section last mentioned became operative, in which he might have sued. Conceding that the six months after July 1, 1895, was an unreasonably short period of limitation, the question arises whether the plaintiff instituted the action within a reasonable time thereafter. The answer is manifest. He delayed not only during the three years immediately succeeding December 31, 1892, but for the further period of two years (less two days) after the end of the three-year period. He brought the action on December 29, 1897,—two years and six months (less three days) after the change from the five to the three year period had been effected, on July 1, 1895. The action was not commenced until nearly five years had elapsed, two and a half years (approximately) of which time was subsequent to July 1, 1895. Applying to the facts as presented the principles announced in *Guiterman* v. *Wishon*, 21 Montana, 458, 54 Pacific Reporter, 566, we must hold, as matter of law, that the plaintiff did not commence his action within a reasonable time after the 1st day of July, 1895, and that the remedy is barred.

The defendant asks that the judgment be reversed and the cause remanded with directions to enter judgment for the defendant. The judgment will be reversed and the cause remanded for a new trial; but we shall not order judgment to be entered for the defendant, as this Court does not know what, if any, errors may have been committed to the prejudice of the plaintiff, the only exceptions which may be considered being those preserved by the appellant. (*Westheimer* v. *Goodkind,* 24 Mont. 90, 60 Pac. 813; *Nolan* v. *Montana Central Railway Co.,* 25 Mont. 107, 63 Pac. 926.)

The judgment is therefore reversed and the cause remanded for a new trial. Let *remittitur* issue forthwith.

Reversed and remanded.

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ASHLEY, RESPONDENT, v. ROCKY MOUNTAIN BELL TELEPHONE CO., APPELLANT.

(No. 1,287.)

(Submitted March 18, 1901. Decided April 22, 1901.)

Telephones—Lease—Right to Remove Telephone—Forfeiture of Contract — Modification—Jury Question — Evidence—Credibility of Witnesses—Instructions — Tender—Mitigation of Damages.

1. **A telephone company leased a telephone to plaintiff under a contract requiring plaintiff to pay $16 per quarter in advance on demand, and authorized the company to terminate the contract and remove the telephone on default in payment by serving written notice on plaintiff, and providing that the contract could not be varied or waived except by a writing signed by the general manager of the company. Plaintiff did not pay an installment of rent on Saturday when it became due, on a demand by the collector of the company therefor, by reason of not having a check book, and the collector suggested that the payment be deferred till the succeeding Monday. On that day the plaintiff tendered the sum to the general manager, who informed him that notice of termination had been served at plaintiff's place of business, and the telephone removed. *Held*, in an action against the company therefor, that it was error to refuse to instruct**

that the failure to pay the collector on demand authorized the company to forfeit the contract, unless the extension of time, if any, by the collector, was in writing, and signed by the general manager.

2. Where the defendant telephone company, in an action for removing a telephone from a customer for a default in the payment of rent, contends that it had terminated the contract by service of notice before the plaintiff tendered the rent due, it is not error to submit the question whether the contract was terminated by notice, as authorized by contract, before the amount due was tendered, though the evidence is uncontradicted that it was so terminated, since the jury is the sole judge of the credibility of the witnesses testifying to the service of the notice.

3. Code of Civil Procedure, Sec. 3390, Subd. 3, requiring the jury to be instructed on all proper occasions that a witness false in one part of his testimony is to be disregarded in others, does not authorize such an instruction without limiting it to wilfully false statements as to material matters.

4. Error, in giving such an instruction, in designating the plaintiff by name, and authorizing his testimony to be disregarded if he has testified falsely in any part of his evidence, is harmless error when a verdict is returned in his favor.

5. Where a telephone company terminates a lease of an instrument on the alleged ground of a default in the payment of rent, and afterwards refuses a payment thereof on the ground of such termination, it is not necessary that such tender should be kept good by a deposit in court to authorize the lessee to recover for wrongful removal of the instrument.

6. Where an action is brought against a telephone company for continuing damages caused by an alleged wrongful removal of a telephone from a customer, the company may plead in mitigation of damages that it afterwards offered to replace the telephone on the payment of certain expenses by the customer, since the customer is required to do every act in his power to decrease the damages resulting from the wrongful act, and the acceptance of the telephone on such condition will not prevent an action for the accrued damages.

Appeal from District Court, Lewis and Clarke County; H. C. Smith, Judge.

ACTION by H. H. Ashley against the Rocky Mountain Bell Telephone Company, for damages caused by a breach of contract in removing a telephone rented to plaintiff. From a judgment in favor of plaintiff, and from an order denying a motion for new trial, the defendant appeals. Reversed.

Mr. H .G. McIntire and *Mr. S. H. McIntire*, for Appellant.

Mr. A. J. Craven, for Respondent.

In the original contract no place was designated where the rentals should be paid. It was therefore alleged and proven that it was the usage and custom of the company to receive its rentals

at the place where its telephones were affixed. This did not contradict the terms of the contract, it interpreted the contract. (*Helme* v. *Phil. Life Ins. Co.,* 100 Am. Dec. 623; 27 Vol. Am. Enc. pp. 807, 808, 834; *Dockman* v. *Smith,* 18 Am. Rep. 495; Civil Code, Sec. 2211; 1 Greenleaf Ev. Sec. 294; *Destreham* v. *Louis Lumber Co.,* 40 Am. St. Rep. 265 and note; *Bowman* v. *First Nat'l Bank,* 43 Am. St. Rep. 874 and note.)

In the case at bar the plaintiff rested quietly, depending upon the promise of extension thus made to him, or upon the withdrawal of the demand until the following Monday. It would be a fraud upon him, having thus acted, to deprive him of the benefit of the promise. The intent of the law is to prevent fraud, not to give it effect. Secton 2050 of the Civil Code was both law and equity before as well as after the adoption of the Codes. There is no pretense that there was any recision attempted of the arrangement made on the afternoon of January 5th, by which Mr. Ashley was to have until Monday to pay his rental. Written contracts varied by parol, if the nature of the modification is not such as the law requires to be in writing. (Beach Modern Law of Conts. Sec. 776.) The fact that the original contract provided that extensions of time or other modifications must be in writing, does not prevent the change by parol. (Beach, *Id.*) A waiver or extension of time of payment is a frequent illustration of the doctrine. (*Id.* Sec. 781; Jones Ev. Sec. 447; see further, *Blood* v. *Goodrich,* 24 Am. Dec. 121; *Freiss* v. *Rider,* 82 Am. Dec. 308; *Langworthy* v. *Smith,* 20 Am. Dec. 652; *Davis* v. *Germaine,* 1 Mont. 210; Beach on Conts. Sec. 845; Bishop on Cont. Sec 795 *et seq.* and Sec. 804.)

As to the attempted defense in the pleadings and evidence that the plaintiff could have procured another telephone from defendant at the same rates, plus fifteen dollars or more installment charges. These so-called installment charges were only another form of the independent hack bill. Putting this sort of defense by analogy in a different setting: Suppose Mr. Ashley had a monopoly of horses in this country and hired a

horse to Mr. Sommers for a specific journey. While the latter was en route Mr. Ashley forcibly and without right took the horse away from Mr. Sommers, but thereafter offered him the same, or a different horse, for the balance of the journey at a higher rate. Would Mr. Sommers be precluded from maintaining a suit for damages because he refused to accept the proposition? If Mr. Sommers must accept the proposition and be subjected to the indignity once in transit, why not also a dozen times? I contend that such acceptance would be a modification of the original contract by mutual consent and consequently a waiver of the previous breach, and that the general doctrine to the effect that one wrongfully deprived of employment or merchandise to which he has a right by contract, should seek employment or similar merchandise from others, does not support the contention of appellant that the law compels him to modify his contract and seek or accept such employment or merchandise at higher rates, from the party who broke the original contract. In the case at bar it was not possible for plaintiff to obtain telephone service from any one but the defendant. (Sedgwick, Sec. 213; *Gulf Ry. Co.* v. *Hodge*, 30 S. W. 831; *Whitmarsh* v. *Littlefield*, 46 Hun. 418; *Havemeyer* v. *Cunningham*, 35 Barb. 515; *Chisholm* v. *P. B. Life Assurance Co.*, 70 N. W. 415.)

As to the error in instruction numbered 10, given by the court: It was the law contained in the Codes. (C. C. P. Sec. 3390, Subdiv. 3.) And the statute was borrowed intact from California, in whose jurisdiction there had been a line of decisions holding that it was proper to follow the wording of the statute, and that the statute itself implied a willingness to swear falsely upon material matter. (*Cameron* v. *Wentworth*, 57 Pac. 650, and cases there cited.) This rule of interpretation accepting the construction of sister states has been followed almost uniformly in Montana and was only departed from when not in harmony with the spirit and policy of our legislation and decisions, and for the strongest reasons. (*Oleson* v. *Wilson*, 20 Mont. 544.)

The only criterion of what the law is, is the statute, if we are fortunate enough to have one bearing directly upon the matter under consideration. And if a litigant requests an instruction and the court gives it in the language of that statute, what overpowering reason is it in this case which would induce the court to overturn precedent and multiply confusion by a decision to the effect that the statute does not state the law? Note how this doctrine of foreign interpretation is reinforced in *Stadler et al.* v. *First National Bank*, and cases therein cited, 22 Mont. 203.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This is an appeal from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial. The action is for alleged breach of contract.

The complaint alleges that the plaintiff and the defendant on April 10, 1894, entered into a written contract, which is set out at large in the complaint. This contract was for the use of a telephone belonging to the defendant company, for which use the plaintiff was to pay the sum of $15 per quarter in advance and $1 additional for an extension bell, the rental all to be paid on the first day of each quarter. Among other things, the contract provided: "Upon nonpayment of any sum due, * * * the lessor may terminate the lessee's right immediately by written notice mailed to or left at the aforesaid premises, and sever his connection, and remove the instruments." It appears also that the rental was payable upon demand, and, further, that the terms of the contract could not be varied or waived by any representations or promises of any canvasser or other person, unless the same was in writing, and signed by the general manager of the defendant company. On Saturday, January 5, 1895, a quarter's rent being due in advance on the 1st of said month, the collector of the defendant demanded of the plaintiff the sum of $16, which, on account of the fact that the plaintiff did not happen to have his check

book with him at the moment, was not paid; but upon the suggestion of the said collector the payment thereof was deferred until the following Monday morning, at which time the plaintiff handed the full sum of $16, due as aforesaid on January 1st, to the superintendent and manager of the defendant company. This money was then and there refused, and returned to the plaintiff with the statement on the part of the superintendent that the contract of rental and use of the said telephone had been by him, in writing declared terminated, and the telephone removed, on account of default in the payment of the sum due on the first of the quarter, and that said notice in writing had been served by leaving it upon the premises of the plaintiff where the telephone had been in use; the contract providing for such termination, and for such service of notice. Plaintiff alleged that the defendant's telephone system was the only one in the city of Helena, where he was doing business. He sued for $1,900 damages, alleged to have been sustained by him through the falling off of his business at his livery stable, where the telephone instrument had been established under said contract. Plaintiff alleged his willingness, readiness and ability to meet all conditions of the contract in case the telephone had not been removed.

The defendant admits the making of the contract; denies that the sum of $16, due as aforesaid, was paid or tendered; admits that the said telephone was removed from the plaintiff's place of business; but denies that the plaintiff was damaged. It alleged and offered to prove that in the same month of January, after the removal of the telephone in question, the defendant company offered, for the use of plaintiff, to put a telephone into the place of business from which the former instrument had been removed, provided the plaintiff would pay to it the sum of $15, the cost of connecting the plaintiff's place of business with the defendant's system, such cost being necessary because of the fact that on or about the 7th day of the said month the right to the use of the poles near the plaintiff's place of business had been by their owner taken away

from the defendant, plaintiff presumably to comply with the same rules and conditions applicable to other customers of the company, but that this offer was refused by the plaintiff. This latter defense was stricken out by the lower court on special demurrer. Judgment was entered against the defendant for the sum of $500 and costs.

There are numerous assignments of error, only a few of which will it be necessary to consider. The court refused defendant's request for the following instruction: "If the jury believe from the evidence that defendant's collector demanded of the plaintiff payment of the money due for such telephone service, and such payment was not then made, then the defendant had the right to terminate said contract; and this is so even if such collector informed the plaintiff that he might make such payment at some subsequent time, unless the jury further believe from the evidence that the representation or promise of such collector, if any, was in writing, and signed by the general manager of the defendant company." Under the terms of the contract the prayer for this instruction should have been granted.

Several assignments are based upon the interpolation by the court in its charge of the words "before any tender of the amount due," and words of a similar import, the ground of the alleged error being that the evidence was undisputed that a notice in writing terminating the contract and service was served before the alleged tender was made. Inasmuch as the jury were the sole judges of the credibility of the witnesses who testified to the circumstances attending the alleged service of the notice and of the weight to be given to their testimony, we cannot say that, in view of the peculiar facts connected with the whole transaction, they did not have the right to determine the question of service adversely to the defendant.

The defendant complains that the court erred in instructing the jury that "a witness false in one part of his testimony is to be distrusted in others; and if the jury believe that the witness H. H. Ashley, or any other witness in this case, has

testified falsely in any part of his evidence given before you, you should distrust that witness as to other parts of his testimony." For the reasons laid down in *Cameron* v. *Wentworth*, 23 Mont. 70, 57 Pac. 648, it was error to give this particular charge to the jury, notwithstanding the language in Subdivision 3 of Section 3390 of the Code of Civil Procedure, which provides that the jury are to be instructed on all proper occasions "that a witness false in one part of his testimony is to be distrusted in others." The words "wilfully" and "material" should be used in proper places in such instructions. The error in said instruction, so far as the special reference to H. H. Ashley, who is plaintiff and respondent, is concerned, was not prejudicial to him, the jury having found in his favor; and, he being the respondent, we cannot consider or pass upon the same.

It is further assigned as error that the court refused to charge the jury that the tender alleged to have been made by the plaintiff the day that defendant claims to have terminated the contract and removed the telephone should have been "kept good, and paid into court for defendant's use." The rent was payable in advance, and was refused by the defendant. The manager of the defendant company declared that he would not render service longer. By what rule or principle of law should the plaintiff have laid aside the $16 for the use of the defendant, when service, for which he should pay in advance, was positively refused? If the telephone had been put back immediately, then he would have owed in advance, and then he would have been obliged to keep the money ready to pay, if refused for any reason by the defendant. When a tender is refused by the party to whom it is made, and the contract is by him ignored, or declared terminated, it is not necessary for the other party to keep the tender good, or to make further tender. (*McCormick Harvesting Machine Co.* v. *Markert*, 107 Iowa 340, 78 N. W. 33; *Williams* v. *Patrick*, 177 Mass. 160, 58 N. E. 583, and cases cited; *Hills* v. *Bank*, 105 U. S. 319, 26 L. Ed. 1052; 10 Rose, Notes U. S. Reports, p. 295; and

Schultz v. *O'Rourke,* 18 Mont. 418, 45 Pac. 634.) In *Hills* v. *Bank, supra,* the United States Supreme Court said: "It is a general rule that, when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused,—that payment or performance will not be accepted."

The sustaining of the special demurrer to that part of the answer setting forth that the defendant had in said month of January, after the removal of the telephone and the alleged notice of termination of the contract, offered to put in a telephone for the use of the plaintiff at his barn, presumably at the same rates as agreed upon under the first contract, provided that the plaintiff would pay the sum of $15 for the expense of putting up poles, was error. The record does not clearly disclose the ground of the special demurrer, but we gather that it was on the ground of want of substance as a defense. Whether, if a motion to strike had been interposed on the ground that the matter was evidence in mitigation inserted in the answer, the motion should or should not have been granted, we do not decide, as the question is not presented. The offer as set out in the answer was not open to objection as a defense. Plaintiff's counsel takes the position that to accept the offer would be a modification of the original contract and a waiver of the alleged breach. The offer, as it is pleaded, is not a modification. If it appeared on the trial to be in fact in such terms as to state or reasonably imply a waiver or modification, then, of course, it would not be incumbent upon plaintiff to accept. To accept telephone service from the defendant, if service was necessary to his business, and it could not be obtained except from the defendant (the defendant company having, as alleged in the complaint, a monopoly of the telephone business in Helena), would not necessarily be a waiver or a modification.

The authorities declaring it to be the law, long settled, that

it is the duty of the injured party, if in his power, to take reasonable measures by which his loss may be less aggravated, are legion. In the case at bar the defendant offered to prove, as aforesaid herein, that by expenditure of $15 the plaintiff could have avoided the alleged loss of $1,900. What was the duty of the plaintiff? Should he have accepted the offer? Mr. Sutherland in his excellent work on Damages (volume 1, p. 155), speaking of the duty of the injured party to reduce or prevent damages, says: "A claimant of damages is bound to accept reasonable offers of the other party, or a third person, having direct reference to the subject of the loss, which would have the effect of reducing or preventing damage."

A contract having been broken by one party, the making of a new contract by the parties thereafter does not necessarily take away the right of action for damages for the breach of the first contract. (14 Am. & Eng. Enc. Law (Ed. 1890) p. 797, Sec. 14, and cases cited.)

A foreman was discharged as incompetent to hold his position as foreman, but was by his late employer offered employment in the same general line of business at the same compensation, and the defendant, sued for damages for breach of contract, offered to prove the tender of new employment; in the case (*Squire* v. *Wright*, 1 Mo. App. 172) the court held that while, strictly, such an offer might not have been a full defense, still it was admissible in mitigation of damages; citing *Pond* v. *Wyman*, 15 Mo. 175.

The judgment and order appealed from are reversed, and the case remanded for a new trial.

Reversed and remanded.

KIPP, RESPONDENT, *v.* SILVERMAN ET AL., APPELLANTS.

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(No. 1,303.)

(Submitted March 21, 1901. Decided May 6, 1901.)

Trover and Conversion—Pleading—Motion to Strike—Notice—Redundancy — Evidence — Contract — Letters — Witnesses — Refreshing Memory — Memoranda — Instructions—Burden of Proof—Trial—Cross-Examination.

1. Notice of a motion to strike out part of an answer, set for hearing August 2d, but not called till the day of trial, in October of the same year, when both parties were present, was sufficient.
2. Where plaintiff alleged a wrongful levy on goods in possession of his agent, and the answer denied plaintiff's ownership, justifying the seizure thereof on a judgment execution against the agent as the owner of the goods, a further paragraph of the answer, alleging the agent's exclusive ownership, and that plaintiff was estopped from claiming any interest therein, because the goods were on an Indian reservation, the rules of which forbade plaintiff from selling at said place, was redundant, and hence properly stricken out.
3. Where plaintiff alleged a wrongful seizure of his goods in the hands of his agent, and the answer, denying his ownership, showed the agent's exclusive possession, management and control thereof, a contract of agency between plaintiff and the agent was properly admitted to rebut the presumption of the agent's ownership.
4. Where plaintiff alleged a wrongful seizure of his goods in his agent's possession on an execution against his agent as owner thereof, letters of plaintiff, ordering goods to be shipped and billed to the agent, with duplicate bills to himself, were not admissible, since they showed no title in plaintiff, and were, at most, extrajudicial declarations, consistent with plaintiff's statement under oath.
5. Code of Civil Procedure, Sec. 3375, provides that a witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred, or when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. *Held*, that a witness was properly allowed to refer to a memorandum of articles as shown in evidence by the sheriff's return, on which the witness, before the trial, had extended the unit and gross cost price obtained by taking the prices from his cost book and price lists kept by himself, and adding the freight and insurance apportioned by percentage.
6. Memoranda used by a witness to refresh his memory as to the cost of goods are no evidence of the value thereof.
7. An instruction, in an action for damages for conversion of a stock of merchandise, that "the burden is on the plaintiff to show that at the times alleged he was the owner of, and entitled to possession of, the goods, etc., and that at said time defendant sheriff wrongfully and unlawfully levied on and sold said goods, to plaintiff's damage; the burden is also on the plaintiff to show that the goods were of any greater value than $1,000, as

admitted by the answer, and that he has expended any sum necessarily in endeavoring to recover said property or the value thereof,"—correctly stated the law on the issues of the ownership of the property and its value.

8. Where plaintiff sought to recover damages for conversion of a stock of goods, apparently in the exclusive possession of his agent, and an instruction was given that the burden of proof was on the plaintiff to show his ownership, a further instruction that the burden was on the defendants to show that, at the time of the levy and sale constituting the alleged conversion, the property was owned by the agent, was erroneous, as conflicting with the previous instruction, and incorrectly stating the law.

9. In all cases where there is an issue as to title the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary, therefore, the obligation rests upon him throughout to sustain this burden by a preponderance of the evidence.

10. Errors of the trial court in limiting the rights of cross-examination are cured by the subsequent admission of the evidence thus sought to be brought out.

11. Under Code of Civil Procedure, Sec. 3376, courts should incline to extend, rather than restrict, the right of cross-examination.

Appeal from District Court, Teton County; D. F. Smith, Judge.

ACTION by Joseph Kipp against J. Silverman and Sol Cohen, co-partners, and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Mr. Thomas E. Brady and *Mr. J. G. Bair*, for Appellants.

Mr. M. M. Lyter, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

Action for damages for a conversion of a stock of merchandise.

The complaint alleges, in substance, that on August 22, 1896, the plaintiff was the owner and in possession of a stock of merchandise at Browning, in Teton county; that the defendant Zimmerman was then, and at the time this suit was begun, the sheriff of said county, and that all the defendants, except Silverman and Cohen, were sureties upon his official bond; that on or about August 18, 1896, the defendants Silverman & Cohen, having brought an action in the district court of

Teton county against one A. B. Hamilton, and having caused an attachment to be issued therein, placed the attachment in the hands of Zimmerman for service, and instructed and directed him to levy upon the stock of merchandise as the property of said Hamilton for the satisfaction of the judgment which they sought in that cause; and that on August 22, Zimmerman, acting under this writ, wrongfully seized and took the property from the possession of the plaintiff, and converted it to the use of himself and the other defendants, to the plaintiff's damage in the sum of $2,000. The defendants, answering jointly, deny the plaintiff's title and possession; allege that the goods were the property of Hamilton; admit a value of $1,000; and justify the seizure under the attachment issued in the action of Silverman & Cohen against Hamilton. They also allege a subsequent recovery of a judgment against Hamilton by Silverman & Cohen, and a partial satisfaction thereof by the proceeds of a sale of the property under execution by Zimmerman. The answer, when filed, also contained the following paragraph: "The defendants, further answering, allege it to be a fact that the said A. B. Hamilton was in the sole and exclusive possession of said stock of goods, had purchased the same in his own name, had them shipped in his own name, and was selling them and dealing with them without directions from any person, and was the sole owner thereof, and that he alone had license and permit to expose goods for sale at said place, and the plaintiff was estopped from claiming any interest therein, or from dealing therein, or handling the same, in any manner; that said goods were upon an Indian reservation, and the said A. B. Hamilton was handling and selling the same as a licensed post trader at said place, and that the rules of the department covering Indian reservations forbade the plaintiff, or any person other than the said A. B. Hamilton, from selling any goods at said place."

Upon the filing of the answer, counsel for plaintiff filed a written motion asking the court to strike out this paragraph, on the ground that it was "immaterial, irrelevant, redundant,

sham and frivolous." The motion was noticed for August 2, 1897, or as soon thereafter as it could be heard, but was not called for hearing until October 4, 1897, the date set for the trial. On that day the court heard and sustained the motion. Thereupon a trial was had, resulting in a verdict and judgment for plaintiff in the sum of $1,806.88, with costs. The defendants have appealed from the judgment and an order denying them a new trial.

1. Error is assigned upon the action of the trial court in striking out the last paragraph of the answer, on the ground that the defendants had no notice of the motion, and also upon the ground that the matter stated manifested an attempt on the part of the defendants to plead an estoppel, and therefore any defect therein could only be reached by demurrer. There is no merit in the assignment. Manifestly, the notice of the motion given defendants was sufficient for a hearing on August 2. It was also sufficient for any date thereafter, provided it was called up at the first opportunity, and at a time when counsel for defendants was present, as in fact he was, when the motion was heard; for the record shows that the motion was granted after argument by counsel for both sides. Indeed, we think the court would have been justified in striking out the paragraph upon its own motion, if brought to its attention at any time before or during the trial. The matters alleged were clearly redundant. The truth of them, as pleaded, if admitted or established by the evidence, would not be defense by way of estoppel (*Sweetman* v. *Ramsey,* 22 Mont.323, 56 Pac. 361), but would rebut the claim of title by plaintiff, and were therefore admissible as evidence, under the denials in the answer. (*Gallick* v. *Bordeaux,* 22 Mont. 470, 56 Pac. 961.) Such was the theory of the trial court, for the defendants were permitted, both upon cross-examination of the plaintiff and in the introduction of their own evidence, to go fully into the situation at Browning, and the relations sustained to the business by Hamilton.

2. The plaintiff testified, in substance, on direct examina-

tion, that he had had a store at Browning for two years or more prior to the date of the levy, and was the sole owner of it; that Hamilton was his clerk, and that one Haggerty was his head man and bookkeeper, with authority to buy and sell goods. On cross-examination he stated that he had been running two stores upon the Blackfoot Indian reservation, but that, owing to a change of rules by the interior department, he could no longer do so; that he thereupon employed Hamilton to run the store at Browning in his (Hamilton's) name in order to evade the rules of the interior department; that the goods shipped from wholesale houses were mostly shipped to plaintiff's other store, about six miles away, and were sent from there to the Browning store; that some of them were shipped directly to Hamilton in his own name, all of those going to the Browning store being marked "Agency Store;" that plaintiff usually ordered and personally paid for all goods shipped; that, when Hamilton made out orders for goods, plaintiff O. K.'d them all, but that Hamilton may have ordered some goods in his own name; that Hamilton managed the store absolutely when plaintiff was not there, extending credit and selling goods as he saw fit, as though the business was his own, but that he had no interest in the business other than as employee of plaintiff. Upon his redirect examination he was permitted to identify a written contract entered into between himself and Hamilton on June 15, 1896, under the terms of which Hamilton agreed to undertake the management of the store at Browning for one year as plaintiff's agent, at a salary of $100 per month. He also identified several letters purporting to contain orders for goods for the Browning store, bearing date from June 11 to June 24, 1896, and addressed to various wholesale dealers at Helena, Mont., St. Paul, Minn., and other places. Most of them contained a request that the goods be billed and shipped to Hamilton, with a duplicate bill to plaintiff, and that they be charged to plaintiff's account. In several instances it was explained that the plaintiff owned the store at Browning, but was permitted to have only one store upon the reservation, and

it was necessary that his name should not appear on the bills sent to Hamilton. To these letters, he stated, his name was signed by his bookkeeper, Haggerty, who had authority to order goods in his name. Thereupon the contract and the letters were all admitted in evidence as exhibits to plaintiff's testimony, over the objection of defendants, the grounds of objection to them being that they were immaterial and irrelevant, as not tending to establish ownership in plaintiff. The court, in overruling the objection, stated that unless it should be shown that the letters were actually sent to the firms to which they were addressed, and that goods were sent in obedience to the requests contained in them, they would be stricken out. Thereupon Haggerty was sworn as a witness, and, after stating fully the relation of Hamilton to the business of Browning, substantially as detailed by the plaintiff, testified that he wrote the letters and mailed them to the respective firms to which they were addressed, and that subsequently he wrote to these firms requesting that the letters be returned to him, which was done. There is no evidence in the record that any of the goods in the stock at Browning at the time the levy was made were obtained through any of these orders. At the close of plaintiff's case, defendants moved the court to strike out all the exhibits. The motion was denied. The defendants now contend that the exhibits should have been excluded as immaterial.

The contract between plaintiff and Hamilton was properly admitted. It tended to show the exact relation between them in the conduct and ownership of the business at Browning, and to this extent to rebut and destroy the presumption of ownership in Hamilton arising from his apparently exclusive possession, management and control. The letters, however, should have been excluded. They did not, in themselves, tend to show title in plaintiff, nor were they so connected by other proof in the case with any of the goods in the stock as to demonstrate that plaintiff purchased any of the goods through them. Viewed in the most favorable light, they are, perhaps to be construed

as extrajudicial declarations by the plaintiff consistent with his statements under oath. To a certain extent the plaintiff was impeached by his admissions that Hamilton was conducting the business in his own name by plaintiff's authority, and also that plaintiff had stated to some of the Indians on the reservation that he had no interest in the store. The courts in some of the states hold that, after a witness has been impeached by previous statements inconsistent with his testimony at the trial, he may be corroborated by evidence that he has given the same account before. But it is obvious that hearsay statements not under oath can add nothing by way of confirmation to what the witness says under oath. The inconsistent statement casts an imputation upon his credibility or memory, and this cannot be explained or repelled by evidence of a previous consistent statement, no matter how often it has been made. Such, in our opinion, is the better view, and the one more in accord with reason and authority. (2 Phil. Ev. (5th Am. Ed.) 814; 1 Greenl. Ev. Sec. 469; *People* v. *Doyell,* 48 Cal. 85; *Reed* v. *Railroad Co.,* 45 N. Y. 574; *McKelton* v. *State,* 86 Ala. 594, 6 South. 301; *Connor* v. *People,* 18 Colo. 373, 36 Am. St. Rep. 295, 33 Pac. 159, 25 L. R. A. 341.) To this rule one exception is recognized by the authorities cited. Where it is charged that the story of the witness is a fabrication, owing to an interest acquired in the result of the case subsequent to the time at which the statement in question was made, then the statement may be admitted, on the theory that it was disinterested, and therefore probably true. It is clear, however, that the plaintiff was prompted by the same motive at the time the letters were written as at the time of the trial; for, if the suggestion of counsel is correct that the motive of the witness at the trial was to shield Hamilton from the claims of his creditors, this was only another step in the plan entered into at the time the contract was made, in June, 1896. The exception stated, therefore, does not apply.

3. The goods in controversy consisted of a great variety of articles such as are usually kept in a country store. The

witness Haggerty gave evidence as to their value. On cross-examination he was questioned particularly as to each item. In order to expedite the somewhat tedious examination, and to assist the memory of the witness, the court permitted him to use a memorandum of the articles as shown by the sheriff's return already in evidence, upon which he had some time before the trial extended the cost price of each item by the pound, dozen, etc., and also the gross price. These cost prices he had obtained by taking the original purchase prices of the articles from his cost book and price lists kept by himself, and adding to them the freight and insurance, apportioned by percentage. He testified that he knew the prices stated, and that the calculations were correct. Counsel excepted, and now assigns error, citing Section 3375 of the Code of Civil Procedure, which provides that "a witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. * * *" This provision is nothing more than a declaration of the common-law rule, and the memorandum used by the witness was clearly such as is permissible under it. The question for the court was not whether the memorandum was primary evidence, but whether it was made under such circumstances that it would aid the memory of the witness in testifying to matters of which he had knowledge. The fact that it was gathered from other memoranda kept by the witness was no ground of objection to its use, it appearing that these had been made at or near the time the purchasers were made, and the prices paid were still fresh in the memory of the witness. (*Calloway* v. *Varner*, 77 Ala. 541, 54 Am. Rep. 78; *Denver & Rio Grande Railroad Co.* v. *Wilson*, 4 Colo. App. 355, 36 Pac. 67; *Erie Preserving Co.* v. *Miller*, 52 Conn. 444, 52 Am. Rep. 607; *Com.* v. *Ford*, 130 Mass. 64, 39 Am. Rep. 426; *Marcly* v. *Shults*, 29 N. Y. 346.) The evidence showing the original cost of the goods was not conclusive as to their

value, but was competent both as to substance and as to the manner of its production. The memorandum was also of material aid in expediting the hearing by enabling the witness to state the cost of each item, without stopping to make a calculation. It was within the discretion of the court to permit this course.

4. At the close of the examination of this witness, the memorandum referred to was admitted in evidence over the objection of the defendants, for the purpose of showing the cost of the goods. This ruling was clearly erroneous, though, perhaps, it did not result in prejudice to defendants; everything which it tended to show being already before the jury. The evidence was wholly incompetent and immaterial, and should have been excluded. So far as the items of goods were concerned there was no controversy. The sheriff's return showed what they were. The value of them depended upon the testimony of the witness, who spoke from knowledge upon that subject, and could not be shown by mere memoranda used by a witness as an aid to his memory.

5. Among the instructions submitted to the jury were the following paragraphs upon the burden of proof:

"The burden is upon the plaintiff to show that at the times alleged he was the owner of, and entitled to the possession of, the goods, wares and merchandise in controversy, and that at said time the defendant John H. Zimmerman, as sheriff, wrongfully and unlawfully levied upon, sold and disposed of the said property, to the damage of the plaintiff. The burden is also upon the plaintiff to show that the goods, wares and merchandise in controversy were of any greater value than one thousand dollars, and that he has expended any sum necessarily in the pursuit of the said property, or in an effort to recover the same or the value thereof.

"The burden is upon the defendants to show that at the time of the levy and sale and disposal of the said property by the said John H. Zimmerman, as sheriff, the goods, wares and merchandise levied upon, sold and disposed of were the prop-

erty of, and were owned by, A. B. Hamilton, the judgment debtor in the judgment upon which the execution was issued, under which the sheriff, John H. Zimmerman, claims to have sold and disposed of said property."

The first of these instructions is a correct statement of the law upon the issues involved in the case, which are the ownership of the property and its value. In cases of this character, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary. Therefore the obligation rests upon him to sustain this burden by a preponderance of the evidence; that is, he must show by a preponderance of the evidence that he has a right superior to that of the defendant, and that the value of the property or the interest therein in question is greater than that admitted by the defendant. Hamilton being apparently in the exclusive possession, and therefore *prima facie* the owner at the time the levy was made, the endeavor on the part of the defendants to show title in him was but one mode of meeting and rebutting plaintiff's claim, and, after presenting their evidence, they would be entitled to a verdict, if the whole of the evidence upon this issue did not show a preponderance in plaintiff's favor. (*Finch* v. *Kent,* 24 Mont. 268, 61 Pac. 653.) The defendants were not under obligation to produce any evidence until plaintiff had made out a *prima facie* case, and then to go no further than to produce sufficient evidence to show an equipoise. The burden, therefore, rested upon the plaintiff throughout. These are elementary principles, applicable to all cases where there is an issue as to title, whether the defendant asserts title in himself or in a third person.

The second paragraph quoted is not only in direct conflict with the first, but it is wrong in principle. By it the jury were told, in substance, that, unless the defendants could show title in Hamilton by a preponderance of the evidence, the plaintiff must prevail.

6. Appellants have assigned in their brief many errors based upon rulings of the trial court limiting the right of the

cross-examination of witnesses. In most instances these rulings, if erroneous, were cured by the subsequent admission of the evidence thus sought to be brought out. We shall not attempt to notice any particular instance. We deem it sufficient in this connection to say that the statute (Code of Civil Procedure, Sec. 3376) permits a wide range for cross-examination, and the courts should incline to extend, rather than to restrict, the right. Properly understood, the right extends, not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury upon the question in controversy.

No point has been made, either in argument or the briefs of counsel, as to the liability in this action of the defendants who are sureties upon the official bond of defendant Zimmerman. We therefore express no opinion upon that question.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

STEVENS, APPELLANT, *v.* RAVALLI COUNTY, RESPONDENT.

(No. 1,380.)

(Submitted March 21, 1901. Decided May 6, 1901.)

Newspapers — Public Printing — Blanks — Newspaper Notice — Computation of Price — Special-Sized Blanks — Appeal—Questions Considered—Exhibits.

1. **Under Supreme Court Rule VIII, Sec. 1, providing that any printed matter introduced in evidence in the trial court may be made a part of the record on appeal by being authenticated by a certificate of the trial judge, printed matter so introduced in evidence will not be considered on appeal unless certified to by the trial court.**

2. Where certain printed exhibits, material to the determination of a cause, are not in the record on appeal, the findings of fact of the trial court will not be reviewed, since all the evidence is not before the court.
3. Under Political Code, Sec. 4233, fixing the maximum rates for public printing, and providing a certain rate for printing blanks, and an increased rate for county warrants, with stubs, printed on bond paper, and providing an additional compensation for numbering and perforating road tax receipts, special poor tax, or other blanks requiring such additional work, the price to be paid for printing, perforating and numbering road tax receipts is the price for ordinary blanks, with additional compensation for perforating and numbering, and not the special rate for county warrants.
4. Under Political Code, Sec. 4233, fixing the maximum rate for public printing, and providing a reduction of a certain percentage for all blanks of a certain kind in excess of 1,000, and providing an additional compensation for perforating and numbering blanks, the charge for perforating and numbering is not reduced because the number exceeds 1,000.
5. Where a printer contracts to furnish blanks to a county for a certain percentage of the maximum rate established by Political Code, Sec. 4233, which provides that the standard of size used shall be flat-cap sheets, 14 by 17 inches, the printer is not entitled to a special price for blanks not capable of being cut from flat-cap paper, since the extra expense of odd-sized blanks should have been considered by the printer in making the contract.
6. Under Political Code, Sec. 4233, providing that newspaper notices printed for the public shall be paid for by the folio, which shall be measured by taking the space occupied by 100 words of solid nonpareil type, a newspaper publishing such notices in larger type is only entitled to compensation for the number of folios which such notices would have required if printed in nonpareil.

Appeal from District Court, Ravalli County; Frank H. Woody, Judge.

ACTION by James E. Stevens against Ravalli county to recover compensation for county printing. From a judgment in favor of plaintiff for less than the relief demanded, and from an order denying a new trial, plaintiff appeals. Affirmed on condition.

Mr. George T. Baggs, for Appellant.

Mr. James Donovan, Attorney General, for Respondent.

Mr. Cornelius B. Nolan, Attorney General, prepared and filed for respondent the following brief:

This Court has repeatedly laid down the principle that where there is evidence to support a finding or verdict as an appellate court it will not disturb the verdict or finding.

(*Lincoln* v. *Radyers*, 1 Mont. 220; *Davis* v. *Blume*, 1 Mont. 465; *Vantilburgh* v. *Hamilton*, 2 Mont. 415; *Story* v. *Black*, 5 Mont. 41; *Kennon* v. *Gilmer*, 5 Mont. 273; *N. P. R. R. Co.* v. *Shimell*, 6 Mont. 166; *Budd* v. *Perkins*, 6 Mont. 226; *Francisco* v. *Benepe*, 6 Mont. 245; *Diamond* v. *N. P. R. R. Co.*, 6 Mont. 586; *Woods* v. *Berry*, 7 Mont. 201; *Fitschen* v. *Thomas*, 9 Mont. 59; *Hefron* v. *Mahoney*, 9 Mont. 505; *Quigley* v. *Birdseye*, 11 Mont. 450; *Merchants Bank* v. *Greenhood*, 16 Mont. 430.)

And this Court has on many occasions announced its adherence to the rule that where the evidence is conflicting the findings of a court or jury will not be disturbed. (*Kleinschmidt* v. *Dunphy*, 1 Mont. 124; *Toombs* v. *Hornbuckle*, 1 Mont. 289; *Kinna* v. *Horn*, 1 Mont. 598; *Knox* v. *Gerhauser*, 3 Mont. 276; *Mont. Ry. Co.* v. *Warren*, 6 Mont. 285; *Beck* v. *Beck*, 6 Mont. 286; *Storey* v. *Maclay*, 6 Mont. 496; *Miles* v. *Edsall*, 7 Mont. 193; *Ingells* v. *Austin*, 8 Mont. 336; *Kennon* v. *Gilmer*, 9 Mont. 110; *Kircher* v. *Conrad*, 9 Mont. 196; *Anderson* v. *Perkins*, 10 Mont. 160; *Sweeney* v. *City of Butte*, 15 Mont. 281; *Cabbage* v. *Schultz*, 16 Mont. 14; *Felton* v. *West, I. M. Co.*, 16 Mont. 85; *Reardon* v. *Patterson*, 19 Mont. 233; *McIntyre* v. *McCabe*, 19 Mont. 334; *Harrington* v. *B. & B. M. Co.*, 19 Mont. 415; *Johnson* v. *Curtis*, 21 Mont. 200; *Sandford* v. *Gates*, 21 Mont. 289.) And in this case there being a conflict of evidence, even though the judgment appeared to be against the weight of evidence, this Court would not disturb it. (*Ming* v. *Truett*, 1 Mont. 329; *Travis* v. *McCormick*, 1 Mont. 349; *Merchants' Bank* v. *Greenhood*, 16 Mont. 430.)

A reference to the "Specifications of particulars in which the evidence is insufficient to sustain the findings and decisions of the court" will demonstrate that the motion for a new trial was based upon an alleged insufficiency of the evidence to support the particular findings. This motion for a new trial was denied. No abuse of discretion is alleged or claimed on the part of appellant and as this is the only ground upon which this Court would overrule and reverse an order refusing or

granting a new trial on the ground of the insufficiency of the evidence, the action of the trial court in this particular must also be affirmed. (*Chauvin* v. *Valiton*, 7 Mont. 584; *Landsman* v. *Thompson*, 9 Mont. 189; *Kibby* v. *Baker*, 9 Mont. 399; *Mattock* v. *Goughnoer*, 13 Mont. 301; *Haggin* v. *Saile*, 14 Mont. 80; *Murray* v. *Heinze*, 17 Mont. 359; *Marsh* v. *Morgan*, 18 Mont. 19.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

On December 8, 1896, the plaintiff and appellant entered into a contract with Ravalli county, through its board of commissioners, and under the provisions of Section 4233 of the Political Code, whereby he undertook to do all printing for the period of two years from January 5, 1897, to January 5, 1899, and to furnish all record books, blanks and other similar supplies for which the county would be chargeable. His compensation was fixed at the maximum rates provided in the statute, less a discount of 65 per cent. on legal blanks, 66 2-3 per cent. on publications, and 35 per cent. on blank books. On March 11, 1898, the board being convened in regular quarterly session, the plaintiff presented to it for allowance his account for work done and supplies furnished during the previous quarter. This account, among other items, included 1,500 road-tax receipts, bound in books, charged at $29; 2,000 assessment lists, each consisting of 6 different sheets, printed on both sides, and fastened together with tin staples, in the form of a booklet, charged at $247.20; a charge for the publication of the annual statement of the financial condition of the county in plaintiff's newspaper, at $58; and a charge for the publication of the delinquent tax list for the year 1897, and a supplemental delinquent list for 1896, three insertions each, fixed at $202. The board having disallowed a substantial portion of each of these and other items, the plaintiff appealed to the district court of Ravalli county. Upon a trial in that court without a jury, the plaintiff recovered a judgment

of $72.27 2-3 more than he was allowed by the board, this amount being the result of a readjustment of the account by additional allowances upon some of the items, and a further reduction of the allowances made by the board on others. The plaintiff, beng dissatisfied with the result as to the four items above mentioned, moved for a new trial. The appeal is from the judgment and the order denying this motion.

It is urged by counsel for plaintiff that the finding of the court below upon each of the items mentioned is not sustained by the evidence, in these particulars: That the court found that the road-tax receipts furnished were eighth-sheet blanks, printed on one side, numbered, perforated and bound, whereas the evidence showed them to be of the same grade and character as county warrants, as charged, and therefore that they should be paid for at the rate provided for county warrants, subject to book discount only; that it found the assessment lists to be half-sheet blanks, printed on both sides, and bound in sets of six, whereas, under the evidence, they were conclusively shown to be booklets or pamphlets, a form of supply not provided for in the statute, and therefore should be paid for as a special job, at a reasonable price, as charged, and not at the rate applicable to half-sheet blanks; and that the number of folios of straight matter and of rule or figure or open work in the two newspaper publications is arbitrary, and not founded upon any evidence in the record. After a careful examination of the transcript, we have concluded that the findings of fact upon these various items cannot be disturbed.

It appears from frequent references thereto by witnesses, and from statements in the brief of counsel for plaintiff, that the court below had before it as exhibits a sample road-tax receipt, an assessment list, and a sheet of flat-cap paper, introduced to illustrate and explain the testimony of the witnesses, and as substantive evidence to show the size and character of the receipt and list. There were also introduced copies of the two publications in question, in the shape of clippings from plaintiff's newspaper, for the purpose of enabling the court,

using them in connection with other evidence on the subject, as to size of type, etc., to determine by measurement the number of folios for which plaintiff was entitled to demand compensation from the defendant. An apparent attempt has been made to incorporate in the transcript what purport to be these original exhibits. We cannot consider them as such for any purpose, however, for the reason that they are not "authenticated by a certificate of the judge of the trial court thereon or attached thereto," as required by Section 1 of Rule VIII of the Rules of this Court. They are not identified in any way, and one of them (the assessment list) is not even attached to the transcript, but is found lying loose among its pages. The sheet of flat cap is missing altogether. We do not doubt the statement of counsel as to the identity of those found with the record. We must nevertheless refuse to consider them, for we feel that we cannot safely disregard the rule, and determine the rights of litigants by reference to matters not properly before us. This leaves us without the means of determining whether the findings of the trial court in the particulars mentioned are supported by the evidence. The statute (Political Code, Sec. 4233), so far as is pertinent to this case, provides: "* * * For every folio of one hundred words, or fraction thereof, not exceeding one dollar and fifty cents shall be paid for the first insertion thereof, and fifty cents per folio of one hundred words, for each subsequent insertion required by law to be made, and three figures or fraction thereof shall count as one word. For ruled and figure work, not exceeding two dollars per folio of one hundred words or fraction thereof, and fifty cents per folio of one hundred words for each subsequent insertion thereof, required by law to be made. That for the purpose of establishing a basis of measurement, the amount of space occupied by one hundred words, set in solid nonpareil type, thirteen ems pica in width, shall constitute a folio in measuring rule and figure or other open work. Printed blanks required by law to be printed for the several counties shall be furnished at the following rates: For blanks cut from flat cap paper,

measuring fourteen by seventeen inches in size, and weighing not less than sixteen pounds to the ream, as follows: For eight [h] sheets printed on one side, two dollars and fifty cents for the first one hundred copies, and twenty-five cents for each subsequent one hundred copies, and twenty cents additional per one hundred copies, if bound. * * * For half sheets printed on both sides, nine dollars and seventy-five cents for the first one hundred copies, and sixty-five cents for each subsequent one hundred copies. * * * When any number of blanks enumerated in the above schedule exceeding one thousand shall be ordered, the price shall be twenty per cent. less than the prices named in the above schedule for each subsequent one hundred copies. County warrants with stubs, printed on bond paper, twenty dollars per thousand. Road tax receipts, special poor tax, or other blanks that are required to be numbered and perforated, two dollars and fifty cents per thousand extra. * * *All other blanks, books or printing not herein provided for shall be furnished and paid for at not to exceed the rates herein provided for similar blanks or printing. * * *" An inspection of the provisions in regard to road tax receipts leads to the conclusion that they are to be considered as blanks, for they are classed with "special poor tax or other blanks." They are, from their nature and use, required to be printed with stubs, and to be "numbered and perforated," as well as bound in books or tablets of suitable size for convenience, for they are used by the proper officer in the collection of this special tax upon personal demand; but they are nevertheless blanks, and are to be paid for as other ordinary blanks, with allowances for the extra work required to be put upon them. The only evidence pertinent in this connection was as to their size and how they were printed, and, as we have said, they must be taken to be, as found by the district court, eighth sheets, printed on one side only, and to be paid for accordingly.

Counsel insists that, though the finding of the court be sustained, nevertheless it was error not to allow for numbering and perforating for 2,000 instead of for 1,000, and half the

thousand rate for the additional 500. In this we think the court was wrong. A fair construction of the provision referred to allows the charge for a less number than 1,000 at the full rate. The price of this item would therefore be arrived at as follows:

100 sheets		$ 2 50
900 sheets at 25 cents per 100		2 25
500 sheets at 25 cents per 100	$1 25	
Less discount at 20 per cent	25	1 00
Binding 1,000 at 20 cents per 100		2 00
Binding 500 at 20 cents per 100	1 00	
Less discount at 20 per cent	20	80
Numbering and perforating		5 00
Total under statute		13 55
Less discount under contract at 65 per cent		8 80
Net amount chargeable		$ 4 75

This makes a difference upon this item of 30 cents in favor of plaintiff. As to the assessment lists, little need be said, as the only complaint made in connection with the allowance on them is that the court did not permit a charge for them as a special charge. The main argument of counsel is that these were of such a size and shape that they could not be cut from flat cap paper. Into this matter of fact we cannot inquire. The policy of the statute is to establish a standard for measuring every kind and class of work necessarily called for in the administration of county affairs, and to have it done under contract. The standard of size and weight of all blanks is the flat cap sheet, 16 pounds to the ream, and measuring 14 by 17 inches. The purpose is to prevent overcharges and constant resort to the courts to settle controversies. So, to save any question, a general provision is added that "all other blanks, books or printing not herein provided for shall be furnished and paid for at not to exceed the rates herein provided for similar blanks or printing." The possible losses in cutting and the extra expense of odd sizes should be foreseen and provided for in the contract. The maximum rates of compensation are certainly liberal, as is evidenced by the liberal discounts under the contract; and if the printer, in making his contract, stipulates for too low a price, he, and not the county, must suffer

the loss. Otherwise the printing might be contracted and paid for without reference to the statute, at rates fixed by agreement between the board and the printer to meet their own peculiar views. The court allowed for this item $64.68, which we think was the full amount to which plaintiff was entitled; the mode of compensation being the same as in case of the road tax receipts, except that the separate sheets were treated as half-sheet blanks printed on both sides.

In making the estimate of the proper allowance for the publications, the court followed the rule laid down in the statute. The folio provided for is the space occupied by 100 words set in solid nonpareil type, 13 ems pica wide. A part of the matter was set in nonpareil, but by far the greater part was set in bourgeois. The court allowed for so much space only as the matter would have occupied had it all been set in nonpareil. This was in accordance with the standard of measurement, and must be the rule of determining the amount charged for this class of work. For the reason already stated, we cannot say whether the district court made any error in its measurements, as the original exhibits are not before us.

The cause is remanded to the district court, with directions to grant a new trial unless within 10 days after filing of the *remittitur* form this court the defendant file with the clerk its consent, in writing, that the judgment be modified in accordance with the views herein expressed, in which event, and upon the entry of the judgment as modified, the judgment and order appealed from will be affirmed. The plaintiff will recover the costs of this appeal.

Remanded for a new trial *nisi*.

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27 484

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BURKE, APPELLANT, *v.* INTER-STATE SAVINGS AND LOAN ASSOCIATION, RESPONDENT.

(No. 1,296.)

(Submitted March 20, 1901. Decided May 6, 1901.)

Judgment — Conclusiveness — Collateral Attack — Jurisdiction — Presumptions — Waiver — Pleading — Summons — Service.

1. A reply denying "each and every material allegation" of the answer, is bad for uncertainty.
2. An objection to a replication denying the "material" allegations of the answer, not taken in the trial court, is waived on appeal.
3. Where a complaint alleged "that the said note is now long past due and unpaid, that payment of the same has been frequently demanded, and that plaintiff is now the owner and holder thereof," a judgment thereon by default is admissible in a collateral action, assuming that the complaint defectively alleged nonpayment of the note.
4. A judgment which is merely voidable is not open to collateral attack.
5. A judgment of the district court, having jurisdiction of the subject-matter of the action, unless void on its face or on inspection of the judgment roll, is not open to collateral attack.
6. Upon direct attack by appeal, the presumption that the court rendering a judgment by default had jurisdiction of the person of the defendant does not obtain; in such case the record must disclose the acquisition of jurisdiction over the defendant, otherwise the judgment will be reversed.
7. Where a direct attack, other than by appeal, is made upon the judgment of a domestic court of general jurisdiction, the presumption that jurisdiction was had of the defendant obtains, unless the record affirmatively shows the contrary, or that the defendant was at the time of service without the territorial limits of the court's jurisdiction.
8. An affidavit of service of summons made by a private person may upon direct attack, other than appeal, be falsified by evidence *aliunde* the record.
9. An affidavit of service of summons omitted the statement that the person serving the same was over 18 years of age, as required by Compiled Statutes 1887, Secs. 71, 78, 80, providing by whom and how the service shall be made, what proof thereof shall be sufficient, and that from the time of service of summons the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. *Held,* that a judgment rendered thereon was not void on its face, so as to be subject to collateral attack; the judgment roll showing no want of jurisdiction, but merely irregularity in obtaining it.
10. Service of summons by one who was not of the age required by statute, though defective, would not make void or subject to collateral attack a judgment rendered by a court having jurisdiction of the subject-matter and parties, and keeping within the limits of its power.
11. Service of summons on Sunday is not a nullity, but a mere irregularity, and a judgment based upon it is not void, but voidable (overruling *Hauswirth* v. *Sullivan,* 6 Mont. 203).

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by John Burke against the Inter-State Savings & Loan Association for an accounting and to quiet title. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Stanton & Stanton, for Appellant.

Mr. James W. Freeman and *Mr. Sol. Hepner*, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

On July 15, 1892, the plaintiff delivered to the defendant his promissory note of that day, and, to secure its payment, executed a mortgage on a lot in Great Falls, Montana. In his complaint he states, in substance, that the note and mortgage have been fully paid and satisfied by him, but that the defendant refuses to surrender the note or satisfy the mortgage, and retains them; that the defendant refuses to account to the plaintiff, or to pay over to him an amount which the plaintiff alleges he has paid to the defendant in excess of the debt; and that the defendant claims an interest in the property mortgaged adverse to the plaintiff, but that such interest, if any there be, is subject to the right and title of the plaintiff. Judgment is prayed for an accounting, and that the defendant be required to satisfy and discharge the mortgage and deliver to the plaintiff the note, to quiet the title of plaintiff as against the defendant, and for judgment in his favor for such sum as may be ascertained to be due. The defendant, by answer, denies that the note and mortgage, or either, have or has been paid or satisfied; and pleads that the defendant has been the owner and in possession of the property so mortgaged, since the 14th day of September, 1894. The defendant demands judgment that the complaint be dismissed, and the defendant be decreed to be the

owner and entitled to the possession of the property as against the plaintiff and those claiming through or under him. The plaintiff, by reply, denies "each and every material allegation in said amended answer contained." There was a trial by jury, whose findings were set aside by the court. Findings were then made by the court, judgment was rendered releasing and discharging the plaintiff from further liability on account of the note and mortgage, and declaring that the defendant has a good and sufficient title to the property, and quieting it in the defendant as against the plaintiff and those asserting any interest acquired by or through him. From the judgment the plaintiff has appealed. Many errors are specified. Some of them are not considered of sufficient importance to require special notice.

1. The defendant suggests that the judgment should be affirmed because the reply is insufficient to raise an issue upon any of the allegations of new matter in the answer. This suggestion is based upon the ground that the plaintiff in his reply denies the "material" allegations of the answer. Such form of attempted denial is bad, for the reason that it is equivalent to saying that the truth of such allegations as the court may decide to be material is controverted, thus rendering it impossible to determine from the reply what is intended to be traversed. Such a denial is at least uncertain. But there was no objection in the court below to the form of the denial, and the cause was tried upon the assumption that the denial was sufficient. Conceding that a reply was necessary to frame an issue upon the new matter in the answer, the objection that might have been interposed to the denial therein contained was waived. (*Missoula Mercantile Co.* v. *O'Donnell*, 24 Mont. 75, 60 Pac. 991.) To hold that the plaintiff, under these circumstances, must be deemed to have admitted the truth of the averments in the answer, would be palpably unjust.

2. To establish its title to the land, the defendant introduced in evidence the judgment roll in a cause entitled "*Moritz Conhaim* v. *John Burke*." The roll disclosed that on October

16, 1893, Conhaim caused to be filed in the district court of Cascade county, Montana, his complaint in an action upon a promissory note alleged to have been made by Burke to him, and that on the same day a summons in proper form was issued; that thereafter the summons was returned and filed, together with the proof of service indorsed thereon as follows:

"State of Montana, County of Cascade.

"J. M. Burlingame, Jr., being duly sworn, says that I received the within summons on the 16th day of October, A. D. 1893, and personally served the same on the 13th day of November, A. D. 1893, upon John Burke, being the defendant named in said summons, by delivering to said defendant, personally, in the said county of Cascade, a copy of said summons.

"JAMES M. BURLINGAME, JR.

"Service, $1.50.

"Subscribed and sworn to before me at Great Falls, Mont., this 13th day of November, 1893.

. . . . . "F. B. WILCOX, Notary Public."

The judgment roll further disclosed that the default of Burke was duly entered, and that on November 24, 1893, judgment by default was rendered and entered for the amount of money stated in the complaint and summons; the judgment reciting, among other things, the following: "In this action the defendant, John Burke, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint filed herein, the legal time for answering having expired, and no answer or demurrer having been filed, the default of the said defendant, John Burke, in the premises having been duly entered according to law, upon application of said plaintiff to the court judgment is hereby entered against said defendant in pursuance of the prayer of said complaint." The defendant proved that the property mortgaged was sold under an execution issued on the judgment, and that on the 28th day of June, 1894, the sheriff executed his deed conveying the property to one Burlingame, and that Burlingame on September

14th of the same year conveyed the property to the defendant in the present cause. To the introduction of the judgment roll the plaintiff objected upon two grounds: First, because the court which rendered the judgment had no jurisdiction over the subject-matter of the action, for the reason that the complaint did not state facts sufficient to constitute a cause of action, in that it did not allege nonpayment of the promissory note; and, second, because the court had no jurisdiction over the defendant in that action, for the reason that he never appeared, "and the summons therein was not served by an officer or a person over the age of eighteen not a party to the action, and for the further reason that the affidavit constituting the proof of attempted service of summons does not state that the affiant was of the age of eighteen, or any other age, at the time of such attempted service." Plaintiff excepted to the overruling of the objections, and specifies the action of the court in that regard as error.

(a) Disposition is readily made of the objection that the judgment is void because the complaint is insufficient in substance. The action was upon a promissory note made by Burke to Conhaim. After pleading execution of the note, the complaint proceeds: "That the said note is now long past due and unpaid; that payment of the same has been frequently demanded; that plaintiff is now the owner and holder thereof." Conceding that the plaintiff was under the necessity of pleading nonpayment of the note, and assuming that the complaint in that regard was defective, nevertheless there was not a total omission of the material averment, but a mere imperfection of statement, which could have been reached only by special demurrer. This is a sufficient answer to the first objection. We prefer, however, to place our decision upon a broader ground, and, in order to do so, we shall assume that the complaint was lacking in the matter necessary to constitute the statement of any cause of action. The district court of Cascade county, which rendered the judgment in *Conhaim against Burke*, is a court of record, and of general jurisdiction both legal and

equitable. It has jurisdiction of the class of cases to which *Conhaim against Burke* belongs. It had jurisdiction, therefore, over the subject-matter of that action; it had authority, that is power, to grant the relief which it did grant by the judgment, and hence there was no excess of jurisdiction. A judgment which is merely voidable is not open to collateral attack. A void judgment is that which is a judgment in name or form only. Unless void on its face, or upon the inspection of the judgment roll, a judgment cannot be successfully attacked collaterally. Upon collateral attack it matters not that such a court erred in determining any question of law or fact; the judgment is not thereby made void. The irregularity or error may be corrected, or the judgment avoided, on appeal, or on a proper and seasonable application to the court in which the action is pending; but it cannot be set aside or purged of error by any other mode. These principles seem to be self-evident, and the authority of adjudged cases supports them. (*Altman* v. *School Dist.*, 35 Or. 85, 76 Am. St. Rep. 468, 56 Pac. 291; *In re James' Estate*, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; 1 Freem. Judgm. Sec. 118; 17 Am. & Eng. Enc. Law (2d Ed.), 1069-1072, and cases there cited.)

(b) Upon direct attack by appeal, the presumption that the court rendering a judgment by default had jurisdiction of the person of the defendant does not obtain. Unless the record in some way discloses the acquisition of jurisdiction over the defendant, the judgment will be reversed by the appellate court. (*Schloss* v. *White*, 16 Cal. 65; *Connoly* v. *Railroad Co.*, 29 Ala. 373; 1 Black Judgm. Sec. 93; 2 Freem. Judgm. Sec. 536.) Where a direct attack, other than by appeal, is made upon the judgment of a domestic court of general jurisdiction, the *prima facie* presumption must be indulged that jurisdiction was obtained of the person of the defendant, unless the record affirmatively shows the contrary: provided it does not appear from the judgment roll that the defendant was at the time of service without the territorial limits of the court's jurisdiction. Upon such direct attack, the *prima facie* presumption of jurisdiction

may be rebutted by competent evidence establishing the lack of jurisdiction over the defendant,—some courts rejecting evidence tending to controvert the officer's return of service, and others admitting it (as is the rule in Montana) for that purpose, but all agreeing that the affidavit of service of summons made by a private person may upon direct attack, other than appeal, be falsified by evidence *aliunde* the record. When, however, the judgment of a court of general jurisdiction, acting within the ordinary scope of that jurisdiction, is assailed collaterally, the presumption of jurisdiction over the person of the defendant is conclusive, unless upon the face of the judgment roll a lack of jurisdiction affirmatively appears. A judgment, when collaterally attacked, must be tried by inspection of the judgment roll and by that alone. These rules rest upon well-established principles.

By "collateral attack," as the expression is used in this opinion, is meant every proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered or by appeal, and except suits brought to obtain decrees declaring judgments to be void *ab initio*. In the case at bar a judgment rendered by a court of record of general jurisdiction, which jurisdiction was exercised according to the course of the common law, is attacked collaterally. The judgment so rendered is asserted to be void upon the ground that the affidavit constituting the proof of the attempted service of summons does not state that the affiant was over the age of 18 years at the time of the service, and upon the ground that the defendant never appeared, and the summons was not served by a person over the age of 18 years, nor by an officer. It may be that the recital in the judgment to the effect that the defendant in the action of *Conhaim against Burke* had been regularly served with process is not in conflict with, but, upon collateral attack, must be deemed to supplement, the statements contained in the affidavit of service made by Burlingame (*Peck* v. *Strauss*, 33 Cal. 678; *Vassault* v. *Austin*, 36 Cal. 691; *Alderson* v. *Bell*, 9 Cal. 315); we are inclined to think

that such should be declared to be the effect of the recital when the judgment is collaterally, or otherwise than in the action or on appeal, attacked, but we reserve a decision of this question, and shall, for the present at least, consider the affidavit of service as being the only proof in the record showing or tending to show jurisdiction of the person of Burke. The sole inquiry under the doctrines which we have announced is: Does the judgment roll in *Conhaim against Burke* affirmatively disclose that the court was without jurisdiction of the defendant therein? There is no controversy in respect of the validity of the summons. No question arises as to the process itself,—it was in all respects conformable to law. The judgment roll in *Conhaim against Burke* is not silent touching the jurisdictional facts, and for the purpose of this appeal we assume, for the time being, that the presumptions which the law raises in support of judgments of courts of general jurisdiction are not indulged when the judgment rolls contain evidence with reference to the jurisdictional facts, but that the evidence alone, unaided by presumptions, is to be considered in determining whether jurisdiction existed,—although we think that the rule may, perhaps, be too broadly stated in *Galpin* v. *Page,* 18 Wallace 350, (21 Law. Ed. 959), for it does not seem unreasonable to us that, on attack other than by appeal, the presumption of jurisdiction over the person of the defendant ought to be indulged in favor of the judgments of such courts, except in those instances where the record, as a whole, affirmatively discloses want of jurisdiction, as was the case in *Dietrich* v. *Martin,* 24 Montana, 145 (60 Pac. 1087), or that the court was not proceeding within the ordinary scope of its power exercised according to the general course of the common law; an example of the latter exception is a case in which the judgment roll shows that at the time of the service or attempted service of summons the defendant was beyond the territorial limits of the court's authority, and does not contain evidence either of service upon him within those limits, or of his appearance. *Dietrich* v. *Martin* seems to be an example of the second exception, as well as of the first.

From the time the summons is served the court is deemed to have jurisdiction of the defendant, and hence jurisdiction of the defendant in *Conhaim against Burke* was acquired, if acquired at all, by the fact that service was made upon him, not by proof of such fact. If he was personally served with summons within the state of Montana, jurisdiction was acquired. Sections 71, 78, 79 and 80 of the First Division of the Code of Civil Procedure of the Compiled Statutes of 1887 provide that the summons may be served by the sheriff, or by any other person over the age of 18 years, not a party to the action; that summons must be served by delivering a copy thereof to the defendant personally; and that proof of the service, when made by any person other than the sheriff, must be by his affidavit showing the time and place of service; and from the time of service of summons the court is deemed to have acquired jurisdiction of the parties or property, as the case may be, and to have control of all subsequent proceedings. The omission from the affidavit of Burlingame of the statement that, at the time he served the summons upon the defendant, he (Burlingame) was over the age of 18 years, is the defect which the plaintiff in the case at bar urges as fatal; he contends that thereby the judgment roll shows that the summons was not served by a competent person, and that therefore the judgment is void upon its face. The plaintiff fails to distinguish between a want of jurisdiction and an irregularity in obtaining it. Says Mr. Freeman in his work on Judgments: "There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. * * * The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral attack." (Section 126.) Upon this subject, Mr. Black, in Section 224 of his treatise on the Law of Judgments, says: "Although the service of process in an

action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For, if the party would take advantage of such a matter, he must do so in the action itself, by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction. In any other case there may be error in the subsequent proceedings, but they will be sustained against a collateral attack;" and in Section 263 he remarks: "We have already seen that defects or irregularities in the process, or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction. It follows that the judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice, although such service of notice may be materially defective." In *Dorente* v. *Sullivan,* 7 California, 279, a case substantially identical with the one now under consideration was presented, and the court said: "It is contended that where service is made by any one other than an officer or his deputy, or a person appointed by the judge, the affidavit should show that the person serving the writ possesses the legal qualifications enumerated in the section; otherwise, any incompetent person might make the service. Granting this proposition, the objection only goes to the formality of the return, which might be amended by the officer. If the return is defective, the defendant must appeal from the judgment; a mere irregularity of service is not sufficient to enable him to attack the judgment collaterally." In *Peck v. Strauss, supra,* the question was again presented and the court adhered to the rule announced in *Dorente* v. *Sullivan,* and held, in addition, that the omission from the affidavit of service of a statement that the person serving the same was over the age of 21 was more than compensated by the recital in the judgment that the default of the defendant was duly

entered. The like doctrine was announced in *Drake* v. *Duvenick*, 45 California, 455, and followed in *Keybers* v. *McComber*, 67 California, 395 (7 Pac. 838). The same rule was declared in *Herman* v. *Santee*, 103 California, 519 (42 Am. St. Rep. 145, 37 Pac. 509). The Supreme Court of Mississippi, in *Harrington* v. *Wofford*, 46 Mississippi, 31, said: "There is a very clear and obvious distinction between a total want of service of process and a defective service of process, as to their effect in judicial proceedings. In the one case, the defendant has no notice at all of the suit or proceeding against him. The judgment or decree in such case, it is conceded, is *coram non judice* and void, upon the principles of law and justice. In the other case, the defective service of process gives the defendant actual notice of the suit or proceeding against him, and the judgment or decree in such case, although erroneous, would be valid until reversed by a direct proceeding in an appellate jurisdiction, and its validity cannot be collaterally called in question. And this view of the law is believed to be sustained by reason, principle and authority." In *Isaacs* v. *Price*, 2 Dillon, 351, Federal Case No. 7,097, Judge Dillon said: "A distinction is to be made between a case where there is *no* service whatever, and one which is simply *defective or irregular*. In the first case the court acquires no jurisdiction, and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment therein, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal. The error in the argument of the defendant is that it proceeds upon the ground that the judgment rendered upon the service made upon him was wholly void." Many other cases to the same effect might be cited.

Inspection of the judgment roll in *Conhaim against Burke* does not disclose a want of jurisdiction of the defendant in that action, and therefore the judgment may not be declared void on collateral attack. Assuming the Burlingame affidavit to

have been the only proof of service, the court merely erred in adjudging the service regular.

3. From what has thus far been said it is not to be inferred that we tacitly assume the judgment would be void if the roll affirmatively disclosed that Burlingame was less than 18 years of age when he served the summons, or if upon direct attack by suit in equity that fact were established by proof, nor can such an inference reasonably be deduced. When Burlingame, who was not a party to the action, delivered to Burke personally a copy of the summons, the latter was thereby notified of the pendency of the action, and of the fact that, unless he appeared, judgment would go against him; he was put upon inquiry, and such delivery was sufficient to subject Burke to the jurisdiction of the court, despite the fact that Burlingame was not of the age prescribed. The service, though irregular or defective, sufficed to accomplish the substantial purpose and object which the law designs the summons to perform. We are of the opinion that even if the judgment roll should exhibit the incompetency of Burlingame in the respect mentioned, or such incompetency were otherwise shown, the judgment for that reason would not be either void or subject to any attack save that by appeal. A judgment rendered by a court having jurisdiction of the subject-matter and of the parties, and keeping within the limits of its power, though it may be voidable, is never void. Jurisdiction of a defendant, when irregularly acquired, may be renounced as the result of suitable proceedings seasonably taken in the action itself, or on appeal from the judgment; but jurisdiction irregularly obtained is nevertheless jurisdiction,—the power to hear, decide and adjudge,—and when this exists the judgment cannot be void. This conclusion inevitably results from the principles announced in the former part of the opinion. Were it not for the case of *Hauswirth v. Sullivan,* 6 Montana, 203 (9 Pac. 798), we should content ourselves with the foregoing observations, and affirm the judgment appealed from without further remark; but that case, when tested by these principles, seems to us to be so manifestly

wrong that we deem it not improper to indicate our views upon the principal point there decided. In the Hauswirth Case the Supreme Court of the Territory of Montana decided that the service of a summons on Sunday was void, and that a judgment by default against the defendant, founded upon such service, was a mere nullity, although the sheriff's return stated that the service was made on Saturday. It was held that the defendant might maintain a suit in equity to have the judgment set aside on the ground that the service was made on Sunday. We are satisfied that the doctrine there announced is erroneous. Service of summons on Sunday is not a nullity, but a mere irregularity with respect to the time or day on which it was made, and a judgment based upon it is not void. While perhaps not directly in point, *Comer* v. *Jackson*, 50 Alabama, 384, and *Hammond* v. *Wilder*, 25 Vermont, 342, strongly support this reasonable and just view. If the Hauswirth Case announces the true rule of law, then titles acquired under proceedings based upon judgments by default are subject to attack at any time and must be declared void whenever it appears that the summons was served on Sunday; for example: In an action upon a promissory note the summons is served upon Sunday, but the return states that service was made on Monday; default is regularly entered, and judgment follows; sale is had under execution; title to the property professedly passes to A., who conveys to B., and B. to C. In the course of time the value of the property increases enormously. The judgment debtor now seeks to have the judgment declared a nullity for the reason that the summons was served on Sunday, a nonjudicial day. Under the holding in the Hauswirth Case the attack must be successful, the judgment and all proceedings thereafter are nullities, and the judgment debtor has the title which by the execution sale professedly passed from him to the purchaser; and, even if the summons had in truth been served on a day other than Sunday, it is possible to conceive of circumstances in which, long after the judgment was entered and the sale made, the contrary might be proved, thereby destroying that

which, for aught the purchasers were able to discover, was a perfect title. Such is necessarily the logical result and effect of that decision, notwithstanding the remarks on page 213 (6 Mont., and page 804, 9 Pac.), touching the assignment of a void judgment, and the rights of "innocent third persons" upon execution sale under a judgment void *ab initio*. The law does not offer a premium for perjury, and should not permit mere irregularities, which have been waived by the only persons entitled to complain, to overturn solemn judgments rendered on personal service of summons. The serving of a summons is a ministerial act in aid of judicial proceedings. Service made on Sunday is voidable; it will be quashed or set aside when the proper motion in that behalf is promptly and seasonably interposed; but, like any other mere irregularity or imperfection, it may be waived. By inaction on the part of the person who might have sought to be relieved of its effect, it is acquiesced in, cured or waived; it is then no longer voidable, and the privilege of taking advantage of it is forever lost. So with the service of the summons in *Conhaim against Burke*: The defendant in that case had the right to move that the service be set aside, and the motion, if made, should have been granted, unless the affidavit were amended, or a new one filed, stating that Burlingame was over 18 years old at the time of service; and, perhaps, on appeal from the judgment, relief would have been obtained, although no such motion had been interposed; but Burke cannot otherwise, either upon collateral or direct attack, successfully impeach the judgment because of the irregular service, or because of the defect in the proof of service.

We are not advised of any other case in this state which announces a rule different from the one applied in the case at bar. *Choate* v. *Spencer*, 13 Montana, 127 (32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424), was, as the opinion states, a direct attack by a bill in equity upon a judgment based upon a summons not attested by the seal of the court from which it issued, and the judgment was for that reason declared void; the court holding that the paper purporting to be the process

of the court was a nullity. *Sharman* v. *Huot*, 20 Montana, 555 (63 Am. St. Rep. 645, 52 Pac. 558), and *Sharman* v. *Eukes* (*Id.*), were appeals from orders discharging a writ of attachment on the ground that the supposed summons was not authenticated by the signature of the clerk, the court holding that the summons was a nullity, and that under Section 890 of the Code of Civil Procedure a writ of attachment which is issued before a valid summons is absolutely void, and not merely voidable. In *Layton* v. *Trapp*, 20 Montana, 453 (52 Pac. 208), it was held, on *certiorari* to review the judgment of a justice of the peace, that the service of the summons must be proved by the affidavit of the person making it, and, such an affidavit not having been made, the justice had no jurisdiction to render the judgment by default. The court said that since the justice's court is a court of inferior jurisdiction, and there are no legal presumptions in favor of its jurisdiction, its jurisdiction must affirmatively appear on the face of the record. *Sanford* v. *Edwards*, 19 Montana, 56 (61 Am. St. Rep. 482, 47 Pac. 212), likewise involved the validity of a judgment rendered by a justice of the peace, the court holding that under the statutes then in force, providing that in actions before a justice of the peace summons must be served by reading it to the defendant personally, or by leaving a copy at his place of residence, the delivery to the defendant of a copy of the summons without reading it to him, or leaving a copy at his place of residence, was not sufficient service, and that a judgment based on a return showing a delivery only was void. *Palmer* v. *McMaster*, 8 Montana, 186 (19 Pac. 585), is clearly distinguishable from the case now before us, for, while the attack upon the judgment was collateral, the judgment was based upon an attempted service of summons by publication, and in such a case the proceeding is not one in accordance with the course of the common law, nor in the exercise of the ordinary jurisdiction of the court. The judgment was declared void in the last named case upon the principles declared in *Galpin* v. *Page, supra*: "Whenever therefore, it appears from the inspection of the record of a

court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. * * * When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the state nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions." It is apparent that the rule applied in that case is based upon a principle different from the one governing the case at bar.

The other assignments of error are without merit.

The judgment will be affirmed, and it is so ordered, *Remittitur* may issue forthwith.

Affirmed.

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ANDERSON, RESPONDENT, v. COOK ET AL., APPELLANTS.

(No. 1,290.)

(Submitted March 19, 1901. Decided May 6, 1901.)

Water Rights—Owners in Common—Diversion of Water—Sufficiency of Findings—Appeal—Question Considered—Conflict of Evidence—Waiver of Objections—Briefs.

1. Where the record on appeal does not show what amendment, if any, was made to the complaint, error in allowing it will not be considered.
2. Where the evidence is conflicting, the findings of the trial court will not be disturbed on appeal.
3. The defendant in an action for diverting water contended that the reason that the water did not flow in plaintiff's ditch was due to the improper

construction. Findings were made that plaintiff and defendant had agreed to construct their ditches on a 12-inch grade, and that plaintiff's ditch was not on a 12-inch grade, and that one point in plaintiff's ditch was as high as the bottom of the main ditch where plaintiff's ditch connected therewith, but that plaintiff's ditch was sufficient to irrigate his land. The findings did not show the grade of plaintiff's ditch, or that the bottom of the main ditch was not below the agreed grade. The court found that the allegation of the complaint was sustained. *Held,* that the findings were sufficient to support a judgment for plaintiff.

4. An owner in common of a water right, who takes water at a main ditch at a point above where the other owner takes water therefrom, is not entitled to withdraw an amount of water in proportion to his ownership of the water right, provided he leaves the proportionate share of the other owner in the main ditch, without regard to the seepage and evaporation of the remainder before it reaches the other owner, a mile distant.

5. Where assignments of error are not mentioned in the brief of appellant, they will be considered as waived.

ON MOTION FOR REHEARING.

A brief disrespectful in language and tone to the supreme court will not be considered, and will be ordered stricken from the files and returned to counsel who prepared it.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Mose Anderson against W. W. Cook and another for the diversion of water. From a judgment in favor of the plaintiff, and from an order denying a motion for a new trial, the defendants appeal. Affirmed.

Mr. Ransom Cooper and *Mr. W. B. Sands,* for Appellants.

Mr. William G. Downing and *Mr. Sam Stephenson,* for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This is an appeal from the judgment in the case and from an order denying a new trial. It is a suit wherein the plaintiff demands damages from the defendants for injury to his crops on certain lands in his possession, the said injury alleged to have occurred through the wrongful acts of the defendants in the year 1896 in their having checked the flow of the waters in question in a certain common ditch running from a common

reservoir belonging to the parties to the action. Plaintiff also prays for equitable relief.

It is alleged by the plaintiff, and admitted by the defendants, that they built, owned and held in common a certain ditch running from the said reservoir down to the point at which plaintiff constructed another ditch to carry the waters from the common ditch to his irrigable lands. The complaint alleged that the ditch running from the reservoir and the reservoir itself were owned by the defendants and plaintiff in the following proportions,—that is to say, plaintiff was the owner of a one-third undivided interest in the common ditch and a one-third undivided interest less one-seventh of one-eighth in the said reservoir, and that the defendants owned the remaining interests in the ditch and reservoir; whereas the defendants alleged that they owned fifteen twenty-seconds of the ditch and reservoir. It is alleged in the complaint, and admitted in the answer, that the reservoir and the main ditch at all times during the spring and summer of 1896 contained an abundance of water for the irrigation of the lands of the plaintiff and of the defendants. The complaint also stated that the said ditches furnished, and there flowed through them, a large volume of water down to certain head gates on the lands of the defendants, and that at two points on said ditch the defendants, without right, wrongfully, and intending to deprive the plaintiff of the use of said water, which belonged to the plaintiff, and to which he was entitled, and in order to prevent the same from flowing on through said ditch to plaintiff's lands, erected head gates at two points on said ditch, and stopped and checked the flow of the water in said ditch, so that the same ceased to flow in quantities sufficient to irrigate any of plaintiff's crops. It was further alleged that the defendants so checked the water, and erected said head gates in such manner, as to check and stop the flow of said water wilfully and maliciously, intending to deprive this plaintiff of the same, and without any reason therefor; that the water so checked and stopped in said ditch overflowed, and was needlessly wasted upon the lands of the defend-

ants, during the season of 1896, and during this time the plaintiff was deprived of the use of the waters, which were greatly in excess of the water needed and used by the defendants, and which would have been ample and sufficient to have irrigated the crops of the plaintiff; that, but for the wrongful checking of the flow of said water in said ditch, and the diversion of said water unnecessarily by the defendants as aforesaid, the said waters would have flowed down to his crops, and would have been ample and sufficient; that from the end of the main ditch running from the reservoir plaintiff continued said ditch down to and upon his said lands, and constructed laterals therefrom to and upon the lands sufficient to irrigate all of the said crops; and that by reason of the checking and diversion of said waters by defendants as aforesaid his crops were greatly damaged, to-wit, in the sum of $1,300.

The defendants demurred to the complaint, stating, among other things, that the complaint did not state facts sufficient to constitute a cause of action, and that the complaint was uncertain in that it did not state the quantity of water wasted by the defendants, and, further, that it did not state the quantity required by the plaintiff over and above the amount received by him. Subsequently a stipulation withdrawing the demurrer and giving the defendants ten days in which to file an answer was made and entered into by respective counsel, and duly filed in said cause. Thereupon the defendants answered, and denied that the said lands of the plaintiff were deprived of water through any acts, wrongful or otherwise, of the defendants; and denied that they, or either of them, or any one else, constructed two or any head gates on any ditch without right or wrongfully, or with the intention of depriving plaintiff, or any one else, of the use of the water, or to prevent the water from flowing to plaintiff's lands or elsewhere. They denied that they, or either of them, or any one else, constructed any head gates whatever which could prevent the free flow of water in the plaintiff's ditch or ditches, and denied that defendants' head gates, or either of

them, stopped or checked the flow of water from the main ditch to or into plaintiff's ditch or ditches; and denied that defendants, or either of them, checked the said waters, or constructed said head gates so as to check the water or to stop the flow thereof wrongfully, or maliciously, or otherwise; or that the said head gates, or any act or omission of defendants, or either of them, stopped or checked the flow of said water into plaintiff's ditch; or that the water so alleged to be checked overflowed or was maliciously wasted upon the lands of the defendants or elsewhere; and denied damage of any kind to the said crops. For further defense they set up that plaintiff's ditch was not at any time of sufficient capacity to convey water sufficient to irrigate any portion of plaintiff's lands, said ditch not being at any time "deep enough to enable sufficient water to flow through the same" for irrigating any portion of his lands.

Upon the trial of the cause, after the swearing of the jury, upon the offer of evidence by the plaintiff, one M. S. Darling, county surveyor, the first witness, being sworn to testify, the defendants objected to any evidence being received under the complaint, for the reason that it did not state facts sufficient which would warrant a court in granting the plaintiff any relief.

In addition to the facts admitted, there is proof, or evidence tending to prove, that:

The defendants, during the times referred to in the complaint, had two ditches leading from the main ditch,—one 2 feet 8 inches wide by 2 feet deep, and the other 3.5 feet wide by 2 feet deep. About one-half mile down the Anderson ditch from the end of the main company ditch was a high point in the bottom of the said Anderson ditch, this point being higher than a head gate opening into one of the defendants' laterals; 1.62 feet of water would run over this high point when the ditch was running full. In 1896 the head gate nearest the reservoir was a board across the lateral ditch, with dirt thrown in above it. Plaintiff did not get one-fiftieth of the water which he claimed. During May and June, 1896, there was plenty

of water, but plaintiff did not "get any to amount to anything." The water went through the head gates of defendants. Plaintiff had water only about four days in May and June. After he had entered suit, "water came on steady from July 3d to August." After suit, water came across the high place spoken of from 7 to 11 inches deep all the time, and 4½ feet wide. When defendants "would keep their boards on so water would come through, there was plenty for all." Water from the ditch stood a foot deep over an area of 10 or 15 acres on the north side of the company ditch on defendants' land. On July 15th (after plaintiff went to Great Falls to institute suit) plaintiff was getting all the water he wanted, and defendants had their ditch full, and were getting probably three-fourths of the water. About June 10th defendants were drawing the water off on both sides of the main ditch, their laterals being full, and "the main ditch as full as it could get," at which time "Anderson was trying to irrigate with no water." In some places the main ditch averaged 20 or 25 feet wide. At the lower end it averaged 12 to 19 feet wide. The reason Anderson got no water was that the main ditch was "that deep that it just simply drew it off." Anderson built his ditch on the survey of one Arnold. Said Arnold surveyed the Anderson ditch, laying it on a grade of 12 inches to the mile. At least one of the laterals of the defendants had a fall of 1 foot to 1,800 feet. The capacity of the main ditch was 1,348 inches, that of the defendants' first ditch 518 inches, and of the second 224 inches. The head gates of the two laterals are about one-half mile apart. The capacity of the Anderson ditch was 383 inches. All of the parties had lands needing irrigation lying under the ditch, and had means of using the water on the crops on said lands, and actually used the same when they could severally get it.

Plaintiff offered to prove that he tendered his services to defendants to build up the levees, but defendants' counsel objected, and the objection was sustained.

In the course of the trial a large number of witnesses were examined, some of them being persons who qualified as having

had considerable experience as surveyors, and as users of water for the purposes of irrigation. Numbers of maps were used and appear as exhibits in this case. Counsel were permitted by the court to examine these witnesses with special reference to what was shown by the several maps, and in the course of the testimony they frequently made statements that were very material as affecting the rights of the parties, using the maps to illustrate definitely what they meant to say. There is not anything in the transcript to indicate to this court to what these witnesses referred when using the maps, so that a large part of what may have been very material and convincing evidence in the minds of the jury or trial judge is altogether without meaning to this court.

There was testimony in conflict with many of the alleged facts stated above.

The defendants assign as error the court's overruling their objection to the introduction upon the trial of any evidence under the complaint upon the ground, then stated, that it did not state facts sufficient to entitle the plaintiff to any relief. The complaint is not conspicuous in the history of code pleading as an example to be followed, for it is redundant in many parts, and not explicit enough in others; but we do believe, and therefore hold, after careful consideration, that it does state facts sufficient to admit proof upon which the court, if satisfied of the truth of the allegations, could afford relief. The complaint was wide open to demurrer for uncertainty, but this ground of demurrer was waived, as before herein stated.

The defendants complain that the court permitted the plaintiff to amend his complaint after objection to the introduction of any evidence thereunder, after the jury was sworn, and then refused to grant them a continuance of the said cause. It is assumed in the briefs that the complaint was amended, but the record, while showing that permission to amend was given, does not disclose what, if any, amendment was made. We, having no means of knowing whether anything, material or otherwise, was added to the pleadings, cannot consider this assignment of alleged error.

The contention of the defendants upon which they rely in the answer was: First, that they did not check the water; and, second, that, if the plaintiff did not get water to irrigate his crops, it was solely because he did not construct his own ditch "properly, and to a depth sufficient to enable the water to flow through the same when maintained to a height in the ditch leading out of said reservoir to which it could be maintained with safety, and without overflowing the banks of said last-named ditch."

To consider all the thirty-five particulars in which defendants claim in their brief that the decree of the court or its findings are erroneous, would require more space and labor than we think necessary. The main points are that the evidence fails to support the findings, and that the decree is not supported by the findings; the principal reliance being upon the ground that the evidence does not show that the defendants used more than their share of the water, and that, if they did, the plaintiff was not damaged by their doing so, for the reason that his ditch would not carry water under safe conditions, or conditions that would allow defendants to use the water in common with him. They further complain "because the decree compels the defendants to forego the use of water two days in each week merely because plaintiff will not put his ditch upon established grade."

As was the case in *Carron* v. *Wood*, 10 Mont. 500, 26 Pac. 388, a study of the evidence presented by the record shows that witnesses for the respective parties had made examinations and measurements of the ditches and head gates, and stated to the jury the dimensions and capacity thereof. As it often happens in controversies, there is considerable difference in the statements of witnesses for the respective parties as to the size, capacity, grade and condition of ditches, head gates, and the nature and effect of any obstructions which may be therein. It was the province of the jury to pass upon the credibility of the witnesses and the weight of testimony, and to make findings. They did so, and the findings were adopted by the court. It has been often announced by this court that, when there is

evidence to support the verdict or the findings, the same will not be disturbed because there is conflicting testimony upon the subject. The jury and court having found that the co-owners of the main ditch had agreed that plaintiff should put his ditch upon a uniform grade of 12 inches, appellant says that findings 1, 2, 3, 4 and 10 declare that plaintiff did not put his ditch on a 12-inch grade, as agreed, and that, therefore, these findings show that plaintiff was the one in fault. To find that a ditch was not put on a 12-inch grade is not to declare that it was not on a grade of, say, 11.95 inches, or perhaps as much as 25 inches. Finding 2, it is true, states that "there was a point in the bottom of said ditch, about one-half mile east of the main ditch, which was of the same height as the bottom of the main ditch at the lower end of the main ditch where plaintiff takes out his water;" but there is no finding that the end of said main ditch was not below grade, or that the laterals of the plaintiff were not taken out within the half mile. The court and jury found, besides, that the condition of the plaintiff's ditch was sufficient to irrigate his crops, and, further, that, if the defendants opened their lateral ditches (into which the head gates let the water), this "would have prevented the plaintiff from getting any water at all."

The court made its further finding "that the allegations of said complaint have been sustained." We find nothing conflicting in the findings. We cannot say that they do not support the decree.

The parties did not own the water. They had a right to the use of it in common. They did not have a prior right. The defendants assume that they were at all times entitled to take out two-thirds of the water, provided they left one-third thereof in quantity in the main ditch. This is error. If there were 1,200 inches in the ditch, and they needed and took out 800 inches at, say, a point 100 feet below the reservoir, there would be left 400 inches, one-third of the volume of water, with a journey of more than one mile to go in warm weather, and over a slow grade, and through a ditch from 144 inches to 228 inches

wide, subject to very great loss from seepage, evaporation and actual leakage. The slightest knowledge of the laws of nature will convince any reasonable person that the plaintiff would get a very small part of the 400 inches wherewith to make his desert lands produce remunerative crops.

Considering the relations of the parties to the contract under which they were to use the water, the findings against the defendants, the evidence in the case, and the obscure nature of the report of the testimony, we cannot say that the court did not do equity in its decree declaring that the plaintiff should have the sole use of the water during two certain consecutive days of each week. This works no hardship to the defendants, as it gives them the use of the water more than two-thirds of the time.

In the transcript appears an assignment "that the evidence is insufficient to sustain the finding that the plaintiff sustained $600 damages, or any damages whatever, at the hands of the defendants;" and it is further assigned that "the decree is against the law, because the damages awarded by the court to the plaintiff are more than three times the amount that plaintiff suffered, under any view of the evidence." Suffice it to say that each of these assignments is omitted from those relied on or mentioned in the brief of the appellant, and therefore no consideration is, under the rules, given to either in this opinion.

For the reasons given in this opinion the judgment, decree and order overruling the motion for a new trial are affirmed.

Affirmed.

ON MOTION FOR REHEARING.

(Submitted June 3, 1901. Decided June 7, 1901.)

MR. JUSTICE MILBURN delivered the opinion of the Court.

In the matter of the motion of appellants for a rehearing, the court is of the opinion that the motion should be denied. Examination of the argument of appellants filed with the motion discloses the fact that the language and tone of the brief are disrespectful to this court. It will be sufficient in this connection to quote the following paragraphs from the brief, to-wit:

"I realize that compared with many of the matters which draw so heavily upon the time and attention of the court that this case is a small one. It is, however, large for the parties interested, and its correct solution means as much or more to them as the proper disposition of the great cases means to the parties interested in them.

"It is of course to be regretted that the record is obscure in some parts, but this does not relieve the court from its obligation to study the record and try to understand it.

"Will the court kindly point out anywhere in the record any evidence which tends to overcome this '*prima facie* case made by plaintiff against himself.

"Now, I do not believe and I cannot believe that this court is ready to establish so absurd a principle of equity jurisprudence as to hold that when defendants had need of water and there was abundance in the reservoir and they could fill their ditches and laterals and at the same time let the main ditch run as full as it could get, that they must stop the use of this water so as to let plaintiff run water up hill, because he was so shiftless that he would not put his ditch to a proper grade: and yet that is just what this court does say in its opinion.

"I do not believe that this court with its eyes open will perpetrate any such outrage as this.

"I deny the legal or moral right of this court to make the defendants assume the burden of compensating plaintiff for that which has resulted from his own fault, and the last quotation made above from the court's opinion shows that it has undertaken to do this very thing."

The only inference possible or proper to be drawn from this language is that it is not respectful. The arguments contained in the brief of counsel are not such as to convince this court that there is any reason why a brief, disrespectful in tone as this is, should be retained in the files and made the subject of further consideration. The brief is stricken from the files and the clerk is directed to return it to counsel for appellants. The motion for a rehearing is denied.

Motion denied.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE PIGOTT: I concur with the majority of the court in the order striking from the files the argument in the brief of counsel for appellants on motion for a rehearing, but I do not feel entirely satisfied with the judgment of affirmance and personally should not be averse to hearing the cause reargued.

ORDER.

Ransom Cooper, Esq., counsel for appellants, having made a satisfactory showing to this court that the language used by him in his brief on motion for a rehearing herein, was not intended to be disrespectful to the court, the order heretofore made striking said brief from the files and denying a rehearing is revoked so far as it denies the motion, the court adhering to the opinion that the said brief was disrespectful in tone; and the motion is permitted to stand for further consideration after said Cooper shall have filed with the clerk and served upon

counsel for the respondent, provided he shall do so within seven days from this date, an appropriate brief setting forth his reasons for asking for a rehearing. It is further ordered that this order be appended to the opinion heretofore filed in the matter of the said motion.

Done in open court this 10th day of June, 1901.

Motion for rehearing granted July 18, 1901.

ON REHEARING.

(Submitted October 1, 1901. Decided November 4, 1901.)

MR. JUSTICE MILBURN delivered the opinion of the Court.

This cause is before us on rehearing. We have again carefully considered the briefs and argument, additional briefs having been submitted. We are more fully convinced of the correctness of our decision, the reasons for which appear in the opinion rendered May 6, 1901.

It is more apparent now, after a rehearing, than upon the first consideration of this case, that the record is so obscure, and the evidence so conflicting, that we cannot say that the evidence does not support the findings which are set out in the judgment.

We again emphasize the fact that we have no means of knowing how material the evidence was which was given by those witnesses who referred to certain maps in such a way, indicating one unmarked point and another, that one cannot get any idea of their meaning in respect of such evidence.

The judgment and the order denying a new trial are affirmed.

Affirmed.

MENDENHALL ET AL., RESPONDENTS, *v.* LYON ET AL., APPELLANTS.

(No. 1,337.)

(Submitted May 15, 1901. Decided May 15, 1901.)

Appeal—Briefs—Affirmance.

Where no brief is filed and submitted to the appellate court, nor any oral argument made pointing out any of the matters on which appellants rely for relief, the judgment will be affirmed.

Appeal from District Court, Park County; Frank Henry, Judge.

ACTION by Susan A. Mendenhall and another against G. M. Lyon and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Messrs. Campbell & Stark, for Appellants.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

Appeal by the defendants from a judgment and an order denying them a new trial. No brief has been filed and submitted in this court, nor has any oral argument been made pointing out any of the matters upon which the appellants rely for relief. The judgment and order are therefore affirmed, on the authority of *Killhonic v. Nuss,* 24 Mont. 292, 61 Pac. 648.

Affirmed.

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BUTTE HARDWARE CO., APPELLANT, *v.* FRANK ET AL., RESPONDENTS.

(No. 1,325.)

(Submitted April 18, 1901. Decided May 27, 1901.)

Mines — Patents—Judgments—Liens—Unpatented Claims—Abandonment—Pleading—Quitclaim Deed—Appeal.

1. An unpatented mining claim being real estate, a judgment lien attaches to it, under Code of Civil Procedure, Sec. 1197, declaring that from the time a judgment is docketed it becomes a lien on all real property of the judgment debtor.
2. A judgment lien on an unpatented mining claim is not lost by the transfer in writing of the claim by the judgment debtor, on the ground that such transfer is an abandonment thereof, since the transfer in writing of an unpatented claim does not amount to an abandonment.
3. Rev. St. U. S. Sec. 2332, declares that nothing in the chapter of the Revised Statutes relative to the locating, holding or procuring of titles to mining claims and to adverse claims, etc., shall be deemed to impair any lien which may have attached in any way to any mining claim prior to the issuance of the patent. *Held*, that a judgment creditor having a lien on an unpatented mining claim was not obliged to adverse the claim of the locator under the United States statutes providing for the filing of adverse claims against one seeking a patent for a mining claim on the public domain. But after execution levied and officer's deed made and delivered, the purchaser should adverse, because the lien is gone as a lien.
4. A quitclaim deed implies a doubtful title in the grantor, and it should not be held to pass anything more than a doubtful title.
5. A complaint alleged that plaintiff had a docketed judgment against R., and that certain unpatented mining claims were conveyed by deed absolute from D. to R., who on the same day gave a quitclaim deed to F., and that the property was sold to plaintiff at judgment sale. F. was in the possession of the property at the time the quitclaim deed was made. *Held*, that there being neither an allegation that R. ever owned any of the property, nor that F. ever got any property or title from him, and there being an implication of doubt as to the title from R., owing to his having given a quitclaim deed to one in possession, the complaint was insufficient to sustain a suit on the theory that the judgment sale of the land to plaintiff transferred to him title to the claims.
6. If the act of the trial court in sustaining a demurrer was right, such act must, on appeal, be sustained, notwithstanding the trial court may have, in sustaining the demurrer, done so for a wrong reason.
7. A judgment may be affirmed for a substantial defect in the complaint, although counsel in their briefs and arguments are silent as to such defect (Mr. Justice Pigott *dissenting*).

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

SUIT by the Butte Hardware Company against Henry L. Frank and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Mr. F. T. McBride and *Mr. Bernard Noon,* for Appellant.

Messrs. Campbell & Parr, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This case comes before this court upon the appeal of the plaintiff from a judgment entered after the sustaining of a demurrer to a complaint, the ground of said demurrer being that the pleading did not state facts sufficient to constitute a cause of action. The plaintiff elected to abide his complaint, and a judgment was entered for the defendants.

Appellant declares that the questions raised by respondents in the lower court are: First, "Does the lien of a judgment attach to an unpatented mining claim under the statutes of Montana, which provide that a judgment becomes a lien upon all the real property of the defendant from the time of the docketing thereof?" and, second, "If it does, is such a lien an adverse claim, within the meaning of the United States statutes providing for the filing of adverse claims in the land office against one seeking a patent for a mining claim on the public domain?" Counsel for the respondents in their brief declare that they do not consider either of the foregoing questions of importance in the case, and therefore refrain from discussing them. They hold that the question to be considered by this court is, "Does a judgment rendered against a locator or a holder of a possessory title to an unpatented mining claim attach to the government's title, where the locator has only the right to purchase from the government of the United States upon certain conditions, where he has failed to exercise that right, and has abandoned the same by conveying his possessory right to another?"

The complaint sets up: that the plaintiff is a corporation organized under the laws of the state of Montana; that a judgment was duly procured and entered in the district court of Silver Bow county in favor of the plaintiff on September 6, 1890, in the sum of $922.02 with costs, against the firm of Gordon & Ritchie, composed of John A. Gordon and Frederick Ritchie, said judgment having been duly docketed on September 17, 1890; that on May 18, 1895, a writ of execution was issued and by the sheriff levied on certain lands described in the complaint, said lands being levied upon as the lands of the said Ritchie; that on the 10th day of June, 1895, the sheriff sold all right, title and interest of the said defendant in said lands; that the plaintiff was the highest bidder, and became the purchaser thereof; that a certificate of sale was executed and delivered by the sheriff to the plaintiff, and was duly recorded in the office of the clerk of Silver Bow county; that there was no redemption, and the sheriff executed and delivered to the plaintiff (it being still the owner of the said certificate) on July 30, 1896, a deed of conveyance of the premises in question; that said property consisted of an undivided one-half interest in the John the Baptist lode, an undivided one-half interest in the Silver Moon lode, all of the Evangelist lode, all of the Mascot lode, all of the Copper Trust lode, and an undivided one-sixth interest in the Eddie lode, situate in said county; that after the docketing of the judgment one Paul A. Davis "conveyed by deed absolute to the defendant Frederick Ritchie the herein-described premises on May 21, 1891, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining;" that "thereafter, to-wit, on the 21st day of May, 1891, the said defendant Frederick Ritchie conveyed by quitclaim deed all his right, title and interest to the above-described premises to the defendant herein, Henry L. Frank;" that at the time of the purchase of said premises by the said Ritchie, and the transfer by him to Frank, the same were unpatented mining claims; "that thereafter, and while the lien of this plain-

tiff's judgment hereinbefore alleged was still a valid and subsisting lien upon said premises, the defendant herein, Henry L. Frank, secured patents from the United States government for said unpatented mining claims as follows, to-wit: Evangelist, August 19, 1893; Mascot, August 19, 1893; John the Baptist, August 19, 1893; Silver Moon, December 21, 1893; Eddie, February 21, 1895; Copper Trust, August 19, 1893."

The complaint further states that on October 23, 1896, the defendant Frank conveyed by quitclaim deed a certain interest in the Copper Trust claim (describing it) to the defendant John S. Clapp; that on the same day said Frank conveyed to F. H. Symons, by quitclaim deed, all his interest in and to a certain portion of the surface ground of the Copper Trust claim (describing it); that "the defendants herein, Henry L. Frank, John S. Clapp and F. H. Symons, are, and have been at all times hereinbefore mentioned, in connection with the said defendants, in possession of and control of the heretofore described premises; that they claim the same adversely, and withhold the same wrongfully and unlawfully and illegally from this plaintiff; that the said claims of the said defendants are adverse to the rights of this plaintiff, and operate as a cloud upon the title of plaintiff, which, unless removed and possession given to plaintiff, will in time ripen into title by adverse possession;" that plaintiff at all times "since the execution of the said sheriff's deed to plaintiff on the 30th day of July, 1896, has been the sole and unconditional owner in fee simple of the said premises herein described, and entitled to the use, benefit and enjoyment of the same, and that it has never parted with the same, or any portion thereof;" that the defendants claim title to said premises by reason of said patents secured by the defendant Henry L. Frank, and the conveyances of Frank to the defendants Clapp and Symons; that defendants further claim that plaintiff is forever barred and estopped from claiming or asserting any right, title or interest in or to the said premises, by reason of its failure to file any adverse claim to the application of said Henry L. Frank for a patent to the prem-

ises at the time he secured the said patents; that plaintiff claims title to the said premises by reason of the sale and the execution of the sheriff's deed as aforesaid; that on May 21, 1891, said judgment became and was a lien upon said property; that the lien of its judgment was preserved by Section 2332 Rev. St. U. S.; and that plaintiff was not required to assert an adverse claim against the alleged application of Frank for a patent. Plaintiff prays that the lien of said judgment may be adjudged and decreed as a valid and subsisting lien upon the property in controversy at the time of said sale, that the sheriff's deed be declared to have passed the title in fee to said premises, that plaintiff be declared the sole owner as against the said defendants, and that the claims of the defendants be declared to be void as to the plaintiff. Plaintiff further prays that it be awarded the possession of the premises free from all claims and demands of the defendants, or those claiming under them, and for further relief. The demurrer was submitted without argument.

The question of whether a judgment lien attaches to an unpatented mining claim is new to this jurisdiction, and is not devoid of difficulty. Section 1197 of the Code of Civil Procedure provides that, "immediately after filing the judgment roll, the clerk must make the proper entries of the judgment under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied." Is an unpatented mining claim real property of the owner? This question must be answered in the affirmative. There is no need to argue this point, as it seems to be settled by authority that unpatented mining claims are real estate. (*Robertson* v. *Smith*, 1 Mont. 410; *Hopkins* v. *Noyes*, 4 Mont. 550, 2 Pac. 280; *Tibbitts* v. *Ah Tong*, 4 Mont. 536, 2 Pac. 759.) They are property in the fullest sense of the word. They may be sold,

transferred, mortgaged and inherited without infringing the title of the government. They may be sold to enforce a lien for taxes. (*Forbes* v. *Gracey,* 94 U. S. 762, 24 L. Ed. 313; *State ex rel. Baker* v. *Second Judicial Dist Ct.,* 24 Mont. 330, 61 Pac. 882.) We cannot do else, in the light of authority, than hold that unpatented mining claims are real estate, and that therefore a judgment duly docketed as provided in Section 1197, *supra,* is a lien upon them, with all other real estate belonging to the judgment debtor.

The point is raised by respondents that a judgment, if a lien, would not be such after sale of the mining claim,—he giving up possession to the vendee,—for the reason that such sale would be an abandonment, and all his rights would be gone, and the lien with them. In support of this position counsel cite *Murley* v. *Ennis,* 2 Colo. 300, which declares that title by location may be lost by abandonment, and that if, *without writing,* he yield up the possession to another, "the right of the first occupant is gone by abandonment, and by virtue of his occupancy a new right has arisen in him who succeeds." It is to be noted that the transfer is said to be abandonment if made *without writing.* The alleged transfer from Ritchie to Frank was in writing; hence the authority does not fit the averment of the complaint. Respondents also cite *Derry* v. *Ross,* 5 Colo. 295, but we find nothing in that case to support the contention that a conveyance to another works an abandonment; for the court holds that mining claims are "rights which may be devested by sale, gift or abandonment." This language is very far from a statement that a sale is an abandonment, but is very strong in its implication that it is not.

Section 2332, Rev. St. U. S., clearly contemplates the buying and selling of mining claims, as it provides that, upon application for patent, evidence may be offered to show the possession of and work done by the applicant's grantors. It would be absurd to permit sales for the benefit of the vendees, and then declare such sales proof of abandonment of all rights of the grantor.

Should a judgment creditor adverse the application of the judgment debtor or his grantee for a patent? We think that there is neither law nor logic suggesting such a thing. In *Hamilton* v. *Southern Nev. Gold & Silver Mining Co.* (C. C.) 33 Fed. 562, 13 Sawy. 113, 117, it was held that the interest obtained by a purchaser at a constable's sale prior to the time of expiration of the publication of notice is an adverse claim, which, unless filed as the law requires, is waived; but the very reason given for this is the reason why a lienor, merely, cannot adverse. The purchaser at the execution sale has stepped into the shoes of the judgment debtor, the owner of the claim; and if the sale be valid he can go on to perform the work and other things necessary to be done, pay the purchase money, contest the rights of other claimants and procure the title from the government, which does not pass by virtue of the officer's deed. Such deed from such officer, selling on execution, passes only the present interest, and not an after-acquired title, and can only have the effect of a quitclaim deed in its strictest sense. Hence, if he have such deed, he must adverse. If he have merely a judgment lien on all the realty of the debtor, he cannot adverse, because he is not yet in the place of the debtor, and, further, because the lien continuing will be a lien on the realty of the debtor after as well as before patent,—no more, no less. In case of a special lien, such as a mortgage, the lienor need not adverse the debtor's claim to a patent, as the patent will inure to his benefit. (Lindley on Mines, 719.) The same reason will, we think, apply to a judgment lien; and, further, such lien, doubtless, is included within the provisions of Section 2332, Rev. St. U. S., which declares that nothing in the chapter of the Revised Statutes which relates to the location, holding and procuring title to mining claims and to adverse claims, etc., shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of the patent. After execution levied and officer's deed made and delivered, the purchaser should adverse, because the lien is gone as a lien. Before such deed made and delivered, no adverse claim may be made.

We come now to the consideration of the point made by respondents' counsel: "Does a judgment rendered against a locator or a holder of a possessory title to an unpatented mining claim attach to the government's title, where the locator only has the right to purchase from the government of the United States upon certain conditions, where he has failed to exercise that right, and has abandoned the same by conveying his possessory right to another?" This question is *petitio principii.* It begs the question, for that it assumes that conveying one's possessory rights is abandonment, which, as we have heretofore shown, is not the case.

The question in this cause is this: Did Ritchie own and convey valid mining claims to Frank by his quitclaim deed, and did Frank prove up on those claims so conveyed to him, and get patents therefor; his right to patents depending, in whole or in part, upon any rights of Ritchie actually conveyed to him by said quitclaim deed? If he did, he bought and took the claims with all the disabilities of the grantor attaching thereto; that is, he bought real estate from the owner, against whom there was a valid, docketed and existing judgment in the district court, and the patent would inure to the benefit of the judgment creditor, and the sheriff's deed, after execution sale, would convey title to the purchaser.

But does the complaint state facts showing such a case as last referred to? The counsel for plaintiff proceeds upon the theory that Ritchie was the owner of said claims; that Frank took title from Ritchie; that Frank had patented certain mining claims located by Ritchie or some predecessor of his, his right to patents depending upon the acts of Ritchie and his predecessor; and that plaintiff is the owner by and through the sheriff's deed.

The amended complaint does not thus state. It does not reasonably imply that these alleged facts are true. The statement that Davis conveyed by "deed absolute" to Ritchie, and that Ritchie conveyed all his interest by quitclaim deed to Frank, is not a statement that Davis or Ritchie owned the property or

any interest therein, or even located or represented it or any part thereof. The deed of Davis might estop him from denying that he had sold the property to Ritchie, but he is not a party to this action. Certainly an admission by Frank, if such should be made, that Davis made a deed of conveyance—a "deed absolute"—to Ritchie, and that Ritchie made a quitclaim deed to him (Frank) would not be an admission that Davis was the owner when he conveyed to Ritchie, or that Ritchie owned said property when he (Ritchie) made the quitclaim deed. A quitclaim deed implies a doubtful title in the grantor, and, such being its character, it should not be held to pass anything more than a doubtful title. (9 Am. & Eng. Enc. Law, 2d Edition, 106, note; *Kerr* v. *Freeman*, 33 Miss. 292; *Emmel* v. *Headlee* (Mo.) 7 S. W. 22.) In *Anderson* v. *Thunder Bay River Boom Co.*, 57 Mich. 216, 23 N. W. 776, it was held that a quitclaim deed from a party not shown to have been in possession at the time it was executed is no evidence of a title,—much less when the party claiming under the deed was already in possession of the land at the time that the deed was given. There is nothing in the amended complaint in the case before us to show that Ritchie—or Davis, even—was ever in possession; but there is a statement in the amended complaint that Frank was in possession and control of said claims at the dates connected with him in said amended complaint, and the date of the quitclaim deed (May 21, 1891) certainly relates to him as well as to the grantor, so that he must have been in possession and control of the property when the quitclaim deed was made, so that, as said in *Anderson* v. *Thunder Bay River Boom Co.*, *supra*, the quitclaim deed was no evidence of title conveyed to Frank.

It cannot be held that in Montana an after-acquired title relates back to a quitclaim, and passes to the grantor in it, if the grantor had no equitable title at the date of the quitclaim deed. How, then, can it be reasonably inferred that, if Frank got a patent, it inured to the benefit of Ritchie's judgment creditor, when it would not even presumptively appear that, if it were in the amended complaint alleged that a patent for

the land had been issued to Ritchie, it would convey the title to Frank? There is no allegation or presumption that Ritchie had the legal or equitable title at the date of the quitclaim deed.

To conclude as to this point, there is neither an allegation that Ritchie ever owned any property on which the judgment was a lien, nor an allegation that Frank ever got any property or title from, by or through him; but, on the contrary, there is implication of doubt as to his title from Ritchie. To allege that Frank took a quitclaim deed while he was in possession and control of the property does not reasonably rebut the idea that he owned the claim as a locator or as assignee of some locator (not Ritchie), and that he procured a patent upon such ownership. It is not unreasonable to conclude from the amended complaint that Frank, in order to prevent the annoyance of a contest in the United States land office, procured such quitclaim deed. The allegation of plaintiff's ownership ever since the sale by the sheriff is no more than a statement that it owns whatever property was actually acquired by and through such sale, wherefore, as we have seen, there is no averment that Ritchie had ever any to sell either to Frank or through the sheriff. It must clearly appear from the complaint that the plaintiff has a right to the thing demanded, or such an interest in the subject-matter of the action as will authorize him to bring a suit concerning it. Failing in this, a general demurrer to the bill for want of equity will lie. (6 Enc. Pl. & Prac. 400, and cases cited.)

Where a seasonable attack is made upon the complaint for want of substantive allegations, the court should indulge, as against the pleader, the presumption that he has stated his case as strongly as he can. (*Conrad Nat. Bank* v. *Great Northern Ry. Co.*, 24 Mont. 178, 61 Pac. 1.)

The amended complaint does not state facts sufficient to warrant the court in affording relief. The demurrer having been submitted without argument, we cannot tell upon what ground the court sustained it; and it does not seem that counsel are agreed upon the points upon which the controversy turned, or upon which it is before us on appeal.

Counsel seem to assume in their briefs that certain averments therein are contained in the complaint; that is, allegations setting up that Frank got the property from Ritchie,—proved up and got his patents by and through Ritchie's quitclaim deed, and title conveyed thereby. But there are no such averments. This case is before this court on appeal from the judgment, which judgment was on demurrer sustained to the amended complaint for want of substance; plaintiff abiding its complaint. The court was right in its decision on the demurrer. The judgment is right, and must be sustained. The court may have, in sustaining the demurrer, done so for a wrong reason, but we have nothing to do with its reasons. Our duty is to pass upon the correctness of its action. If the act of the court in sustaining the demurrer was right, the court must be sustained. (Hayne on New Trial & App. p. 839.)

The silence of counsel as to the defects found by this court in the said complaint cannot in such a case as this be regarded as a restriction upon the legal scope of the general objection raised by the demurrer.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE PIGOTT (dissenting): I concur with the majority of the court in holding that an unpatented mining claim is real property subject to the lien of a docketed judgment, that the holder of such a lien is not an adverse claimant within the meaning of congressional legislation, and that the conveyance of an unpatented mining claim is not an abandonment. The complaint is, I think, defective in the particulars adverted to in the opinion, and, if they had been pointed out or even suggested in this court I should not hesitate to concur in the judgment of affirmance, But neither party has suggested that the complaint is wanting in substance because the allegations which this court deems necessary have been omitted therefrom. In their briefs and arguments counsel do not intimate that the

complaint is insufficient for want of the averments mentioned, —on the contrary, all the arguments are devoted to the question whether the complaint in other respects fails to state facts sufficient to constitute a cause of action. So far as the present appeal is concerned, this court should, I think, examine the complaint for the purpose of determining whether it is obnoxious to the specific objections urged, and should not affirm the judgment below upon a point not made, but practically waived, in this court. It would be eminently just and proper in reversing the judgment to call attention to the seeming defect, so that upon remand appropriate steps might be taken, the complaint being susceptible of amendment according to the facts. But the complaint is now held to be insufficient, and the judgment is affirmed, because of a defect not relied upon by the respondents. It is true that in *Wilson* v. *Harris*, 21 Montana, 374 (54 Pac. 46), a complaint was declared to be insufficient upon a ground not specifically relied on by the defendants; but that was a very different case from the one at bar, and there the judgment was reversed and a new trial ordered on appeal by the defendants, thereby affording an opportunity for amendment.

I am therefore constrained to dissent from the judgment of affirmance.

STATE EX REL. DONOVAN, ATTORNEY GENERAL, PLAINTIFF, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., DEFENDANTS.

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(No. 1,673.)

(Submitted May 10, 1901. Decided June 3, 1901.)

Wills—Contest—Filing—Leave of Court—Necessity—Escheat—Right of State.

1. **Grounds for contesting a will, which were filed before the date to which the hearing of the petition for probate had been postponed, were in time,**

though the time originally fixed by the court within which objections might be filed had expired.

2. Code of Civil Procedure, Sec. 589, providing that any person, before trial, may intervene in an action by filing, by leave of court, the grounds of the intervention, does not apply to the filing of grounds for contesting a will.
3. Under the Codes of 1895, a proceeding by the attorney general to reduce property to his possession, or a proceeding by him in the nature of an inquest of office to determine whether the state has title to lands, may not, in any event, be commenced within five years after the death of the decedent.
4. To entitle a person to oppose a testamentary paper under Section 2329 of the Civil Code, it is sufficient if he disclose the existence of a contingent interest.

5. Civil Code, Sec. 1852, Subd. 8, provides that if an intestate leaves no heirs, his estate escheats to the state; and section 2329 authorizes any person interested to contest a will. *Held,* that, where a testator died without heirs, the state was entitled to contest a proposed will, since it was an interested party, within the meaning of the Code.
6. Civil Code, Sec. 1867, provides that no resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession; and section 1868 declares that, when succession is not claimed as provided in the preceding section, the district court must direct the attorney general to reduce the property to the possession of the state, and that the proceeds thereof must be deposited in the state treasury, to be paid to a nonresident alien whenever, within five years after such deposit, he shall prove that he is entitled thereto. Code of Civil Procedure, Part III, Title VIII, authorizes the attorney general to file an information on behalf of the state requiring all persons interested in an estate to appear and show cause why the same should not vest in the state. *Held* that, where a testator had no resident heirs, the state was entitled to file objections to the probate of the will before the expiration of five years from testator's death; otherwise the right to contest would be barred by Code of Civil Procedure, Sec. 2366, making the probate of a will conclusive if not contested within one year.

MANDAMUS by the state, on the relation of James Donovan, attorney general, against the district court of the Second judicial district of the state of Montana and E. W. Harney, one of its judges. Motion by defendants to quash an alternative writ. Motion denied, and peremptory writ granted.

Mr. James Donovan, Attorney General, and *Mr. Peter Breen,* for Relator.

Mr. J. B. Dennis and *Messrs. Roote & Clark,* for Defendants.

The state of Montana is not entitled to take possession of the estate of a decedent until five years after his death. (2d Vol. Code (Mont.) Sec. 1867.) Nor can the attorney general

reduce the property to possession until after that time. (2d Vol. Code (Mont.) Sec. 1868; 2d Vol. Code (Cal.) Sec. 1405.) The estate does not really escheat until ten years after decedent's death. (*Id.* Sec. 1869; *Id.* Sec. 1406; Presumptions Vol. 3, Code California, Sec. 1963, Subd. 28; Presumptions Vol. 3, Code Montana, Sec. 3266, Subd. 28.) The statutes of Montana prescribe and this court has distinctly held that an intervener must first obtain permission of the court before he can be heard. (Code of Civil Procedure, Sec. 589; *Deitrich* v. *Steam Dredge*, 14 Mont. 261.) Had the "objections" of the attorney general been filed with the court's permission, we contend that the state of Montana could not contest the validity of the will until the expiration of five years after Colbert's death. If there were heirs or legatees, the law gives them the sole right of such a contest. (*Franke* v. *Shipley*, 29 Pac. 268.) The law presumes that a citizen dying intestate had heirs. (*Wilbur* v. *Tobey*, 16 Pick. 177; *People* v. *Roach*, 76 Cal. 294.) And this presumption continues in this state for five years after death. (Civil Code, Secs. 1867-1868.)

The attorney general cannot contest the validity of a will until there has been an inquest of office in the manner directed by Section 2250 *et seq.* of the Code of Civil Procedure of the Statutes of Montana, and Section 1868 of the Civil Code. And this suggestion is sustained by the following authorities: *People ex rel. Atty-Gen'l* v. *Roach*, 76 Cal. 294; *State* v. *Smith*, 70 Cal. 153; *People ex rel. Atty.-Gen'l* v. *Folsom*, 5 Cal. 374; *Frank* v. *Shipley*, 29 Pac. Rep. 268 (from Supreme Court of Oregon, March 4, 1892); *Wilbur* v. *Tobey*, 33 Mass. (16 Pick.) 177; *Hoff* v. *State*, 72 Texas 281 (also reported in 10 S. W. Rep. 589); *Jackson* v. *Adams*, 7 Wend. 367; *Rubeck* v. *Gardner*, 7 Watts (Penn.) 455; *Crawford* v. *Commonwealth*, 1 Watts (Penn.), 480; Political Code, Sec. 463.

We urge that it is unnecessary in the determination of the question raised by the attorney general's brief (i. e., can the state of Montana become seized at once, under any circumstances, of the property of a person dying intestate?), to look

beyond our own constitution and statutes and the decisions of the Supreme Court of California construing the laws of California, from which ours are borrowed. In adopting the statute of another state we adopt the construction placed upon it by the courts of the state from which the statute is borrowed. (*Stackpole* v. *Hallahan*, 16 Mont. 40; *Murray* v. *Heinze*, 17 Mont. 353; *State* v. *O'Brien*, 18 Mont. 1; *State ex rel. Milsted* v. *Butte City Water Co.*, 18 Mont. 199; *Largey* v. *Chapman*, 18 Mont. 563.)

The attorney general adverts to the well known doctrine that title to property must always be vested somewhere; that it cannot remain suspended in the air. This might avail him in this case if it were true, as he seems to think, that Colbert died without heirs. This, however, is impossible. It is a presumption of law that every intestate has left some one on earth entitled to claim as his heir, however remote. (Code of Civil Procedure, Sec. 3266, Subd. 28; Abbott, Trial Evidence, 2d Ed. p. 110.) In every provision of our Codes relating to the administration of estates and germane to the subject this presumption is indulged. These provisions are numerous. (*People* v. *Roach*, 76 Cal. 297.) The title to the property left by Colbert at the time of his death could not therefore have vested, as urged by the attorney general, in the commonwealth immediately upon Colbert's death. The attorney general cannot say that there are no heirs; it cannot be proven that there are no heirs. The law presumes otherwise. And even if it were possible that Colbert died without heirs, this fact cannot possibly be proven. The commonwealth is not a party interested in the estate, and for this reason cannot, as we think, contest the will offered for probate. "Any person interested" has been defined to mean a person having a pecuniary or property interest in the estate. (*Estate of Sanborn*, 98 Cal. 103; *McDonald* v. *White* (Ill.), 22 N. E. 600; *Estate of Parsons*, 65 Cal. 240; *Hickman's Estate*, 101 Cal. 612, 36 Pac. 118; *Franke* v. *Shipley* (Oregon), 29 Pac. 268; *Estate of Healy*, 122 Cal. 163, 54 Pac. 736.)

The statute does not give the commonwealth the right to contest wills. Section 2329 of our Code of Civil Procedure prescribes who may appear and contest wills. We urge that no others may appear. The state is not mentioned as one who may appear and contest a will, but only "parties interested," which means those having a pecuniary or property interest in the estate. The commonwealth of Montana cannot have any pecuniary or property interest in the estate of Colbert. There are heirs. It cannot be said at this time that they will not appear within the time allowed them by law and claim the estate to which they are entitled. If the state ever acquires any interest whatever in Colbert's estate, it will do so by reason of the fact that the heirs who, as we have seen, do exist, fail to appear within the time allowed by law to claim the estate. (*State* v. *Smith*, 70 Cal. 156.) It is clear by the decision just cited that the commonwealth does not acquire any interest whatever in the estate of a deceased person at the time of his death, and we cannot presume that those who are interested in the estate and who have the right to succeed to it by inheritance will not appear and set up their claims. It cannot be urged either that the state, though having no interest now, may acquire an interest at some future time by the failure of heirs to appear and claim the property. Under a statute similar to ours it was held in Illinois that a will could only be contested by persons interested at the time. (*McDonald* v. *White*, 22 N. E. 600.)

If we are justified in insisting upon a strict construction of Section 2329 of our Code of Civil Procedure, where it is provided that "any person interested" may appear and contest wills, we contend that this excludes all persons who are not interested in the estate from appearing and contesting wills offered for probate. The maxim *expressio unius est exclusio alterius* governs. (Sunderland on Statutory Const. Sec. 327.)

We agree with the attorney general that the freehold must always vest somewhere; that it cannot remain suspended in the air; but disagree with him in the present instance as to whether

or not the freehold is vested in the commonwealth, and confidently urge that it is not vested in the commonwealth, but is vested in either the heirs of the estate, which, as we have seen do exist and which fact cannot be controverted, or else is vested in the devisees and legatees named in the will offered for probate, which is true if the will is genuine. If the will offered for probate is in fact the lawful will of the deceased, then the freehold vested instantly upon his death in the devisees named therein. (*Otto* v. *Doty* (Iowa), 15 N. W. 578; *Olleman* v. *Kilgon* (Iowa), 2 N. W. 612.) The provision of the statute that "any person interested" may appear and contest the will excludes all persons who are not interested. There is no exception in favor of the state. She cannot invoke her prerogative in this matter. The state has no interest and no right to interfere by any proceedings until after five years have expired. Even then the state can only proceed in the manner pointed out by the statute; the proceeds of the estate are then to be paid into the treasury and must remain there for another period of five years, within which the heir can come in and present his claim. Only after the expiration of this extended period does the right of the estate begin to operate. We think that the case of *People* v. *Rodgers*, 13 Cal. 159, is conclusive on this proposition and renders further argument unnecessary.

The attorney general states in his brief that any interest, however slight, is sufficient to entitle one to contest a will. His difficulty and his error are in confounding the possibility of an interest at some time in the future with a slight interest. We concede that a person, the value of whose interest in an estate amounts to but one dollar, is as much entitled to contest a will offered for probate as one, the value of whose interest amounts to one thousand dollars. The case cited by the attorney general on this point, viz., *St. John's Vestry* v. *Bostwick*, 8 D. C. App. 464, is against the great weight of authority and does not govern in this case. (*McDonald* v. *White* (Ill.), 22 N. E. 600; *Franke* v. *Shipley* (Ore.), 29 Pac. 268; *Shepard's Estate*, 170 Pa. St. 323, 32 Atl. 140; *Cochran* v. *Young*, 104 Pa. St.

333; *Lockard* v. *Stephenson* (Ala.), 24 So. 996; *Storrs* v. *St. Luke's Hospital*, 75 Ill. App. 152, 72 Am. St. 211; *Estate of Healy*, 54 Pac. 736, 122 Cal. 162; *Fallon* v. *Fallon*, 107 Iowa 122.)

The attorney general urges at great length that inquest of office is not necessary to pass title to the state. Again we must express surprise at his total disregard of the statutes of Montana. Sections 2250 to 2253, inclusive, of our Code of Civil Procedure, provide the manner of conducting proceedings relative to escheated estates. The question of the escheat of a decedent's property for nonexistence of heirs can be determined only by the method provided by the statute. (*Muir* v. *Thomson*, 28 S. C. 499.) It must be established by a judicial proceeding in the proper court in the name of the people, for the purpose of proving and establishing it by judicial determination. (*Wallahan* v. *Ingersoll*, 117 Ill. 123.) The proceeding is in the nature of an inquest of office and the record of it is the only competent evidence by which a title to escheat can be established. (*Den* v. *O'Hanlon*, 21 N. J. L. 582; *Crane* v. *Reeder*, 21 Mich. 24; *Commonwealth* v. *Hite*, 29 Am. Dec. 226; *People* v. *Folsom*, 5 Cal. 373.) Where the statute requires proceedings in the nature of an inquest of office, the record thereof is the only evidence by which title by escheat can be established by the state. (*Wallahan* v. *Ingersoll*, 117 Ill. 123.) Inquest of office is necessary when required by statute, and until inquest of office, no title passes to the commonwealth. (*People* v. *Roach*, 76 Cal. 294; *State* v. *Smith*, 70 Cal. 153.)

The doctrine that one who does not have a pecuniary interest in the estate cannot contest a will offered for probate is supported in the following cases: *Crerar* v. *Williams*, 34 N. E. 467; *Jele* v. *Lemburger* (Ill.), 45 N. E. 279; *Wilcoxon* v. *Wilcoxon* (Ill.), 46 N. E. 369; *Lewis* v. *Cook* (N. Y.), 44 N. E. 778; *Lockard* v. *Stephenson* (Ala.), 24 So. 996; *Shepard's Estate* 32 Atl. 1040; *In re Brown*, 47 Hun. 360; *Stewart's Estate* (Iowa), 77 N. W. 574; *Meyer* v. *Fogg* (Fla.) 68 Am. Dec. 441, and note; *In re Fallon's Will*, 77 N. W. 575; *Mid-*

dledith v. *Williams,* 47 N. J. Eq. 585, 21 Atl. 290; *Maurer,* v. *Naill,* 5 Md. 324; *Storrs* v. *St. Luke's Hospital,* 75 Ill. App. 152, 72 Am. St. 211; *Franke* v. *Shipley,* 29 Pac. 268; *McDonald* v. *White* (Ill.), 22 N. E. 600; *McChutchen* v. *Loggins,* 19 So. 810; *Murry* v. *Hennessy,* 67 N. W. 470; *Taff* v. *Hosmer,* 14 Mich. 249; *Hopf* v. *State* (Tex.), 10 S. W. 589; *Estate of Parsons,* 65 Cal. 240; *In re Hickman,* 101 Cal. 612; *Sanborn's Estate,* 98 Cal. 103; *In re Welch,* 106 Cal. 429; *Estate of Radfield,* 116 Cal. 643; *Estate of Healy,* 122 Cal. 163.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

The object of this proceeding is to obtain a writ of mandate requiring the defendants, the district court of Silver Bow county and E. W. Harney, one of its judges, to restore to the files certain grounds of opposition to the probate of the will of one Charles Colbert, deceased, and to hear and determine them.

The affidavit in support of the application for an alternative writ and the answer of the defendants show these facts: On February 14, 1901, Charles Colbert died in the county of Silver Bow, Montana, leaving an estate therein of the value of $50,000 or thereabouts. On February 21, 1901, one Woolbeater filed in the district court of that county his petition for the probate of an alleged will of the decedent, dated February 11, 1901, in which Woolbeater and one Lippincott were named as legatees and devisees, and for issuance to Woolbeater of letters testamentary. The petition was set for hearing on March 9, but was thereafter postponed to April 9, 1901. In the meantime, on April 3d, the attorney general of Montana (the county attorney of Silver Bow county being associated with him) for and on behalf of the state, filed written grounds of opposition to the probate of the purported will, alleging that Colbert died intestate, leaving no heirs within the state or elsewhere to the knowledge of the petitioners; that Colbert was, by reason of physical and mental debility and unsoundness, incompetent to make a last will and testament; that the pretended will was not

subscribed or published by Colbert, but that his name was forged thereto after his death by the beneficiaries named therein; and that the contest was instituted for the reason that, in the absence of any heirs, the estate will escheat to the state of Montana. These grounds of opposition the proponent on April 9, 1901, moved to strike off because they had been filed without permission after the time prescribed by the court within which persons might appear to contest; because the time within which the estate might escheat had not expired, and because escheat cannot be determined in probate proceedings. Further reasons were recited in the motion, but were abandoned on the argument, and will not be noticed. The motion was granted, and the district court and its judge will, unless otherwise directed by this court, proceed to hear, and hear, the petition for the probate of the will, ignoring the objections, and denying the state any right to contest the will before its probate.

Upon the foregoing facts, the defendants ask that the alternative writ of mandate be quashed, insisting that the state has no right to contest the probate of the will.

Although the arguments have taken a wide range, there are really but two questions necessarily presented: (1) Were the grounds of opposition to the probate of the alleged will filed in due season, and (2) has the state such an interest as entitles it to contest the probate of the purported will? We shall do little more than announce our conclusions.

1. The contest was instituted by filing written grounds of opposition before the date to which the hearing of the petition for probate had been postponed. In the recent case of *Raleigh* v. *District Court,* 24 Montana, 306 (61 Pac. 991), a contest initiated after the time originally appointed for the hearing of the petition but before the hour to which the hearing had been postponed was held to have been in due season. Applying the rule of that case, the contest in the case at bar was begun in time, and there was no reason or necessity for obtaining leave of court to file the grounds of opposition. Section 589 of the Code of Civil Procedure refers to intervention, and has nothing

to do with the commencement of proceedings to contest a will under Sections 2329 and 2340 of the same Code.

2. Counsel for the defendants insist that the contest which the state endeavored to make was a proceeding in escheat, or to have an escheat declared. If this were its character, the proceeding was premature, and the district court properly refused to entertain it, for, under Sections 1867, 1868 and 1869 of the Civil Code, Sections 4510 and 4521 of the Political Code, and Title VIII of Part III of the Code of Civil Procedure, a proceeding by the attorney general to reduce the property to his possession, or a proceeding by him in the nature of an inquest of office to determine whether the state has title by escheat to lands, may not, in any event, be commenced within five years after the death of the decedent. (*People* v. *Roach*, 76 Cal. 294, 18 Pac. 407.) But the contest of a will does not involve the question whether the property has escheated or will escheat, nor the question whether the property or its proceeds should be deposited in the state treasury for the benefit of nonresident alien heirs. Neither question can be adjudicated upon the contest of a will or of its probate. The office of a contest is to attack the validity of a purported will; its object is to have such will rejected; consideration of the question of title, except in so far as it may be essential to ascertain whether the contestant is an interested person, within the meaning of Sections 2329 and 2340 of the Code of Civil Procedure, would be without the legitimate scope of the proceeding.

Much—indeed the greater part—of the argument has been addressed to the question whether title to the property of a decedent which escheats, vests immediately upon his death, or not until the heirs have failed to claim succession within the time prescribed by statute. On the part of the state it is maintained that title vests at the moment of death, while the defendants argue that that the state does not acquire any title during the five years following the intestate's death. We deem it unnecessary to decide which of these positions is correct. Assuming, for the purposes of the present case, that the contention of

the defendants in respect of the time when title by escheat vests should be upheld, the question presented is: Has the state such an interest in the probate of the will or in the property of the estate of Colbert, deceased, as entitles it to contest the will? Subdivision 8 of Section 1852 of the Civil Code provides, in substance, that, if an intestate leaves no heirs, his estate escheats to the state. Section 2329, *supra,* provides that any person interested may appear and contest a will. The grounds of opposition to the probate of the will offered by Woolbeater, if established, would result in its rejection, in which case, if there are heirs or another will, the property would descend to them, or pass by purchase to the devisees or legatees, provided they appear within the periods prescribed by statute. To show the state's interest, the attorney general alleged that Colbert died intestate, leaving no heirs within the state or elsewhere, to his knowledge. We think the state exhibited *prima facie* sufficient interest to enable it to institute a contest of the will. If there is no valid will, and no heir asserts his right of succession within the statutory period, the estate escheats. True, heirs may appear in due season; the state would then cease to have an interest in the property. The present interest of the state depends, therefore, upon the nonascertainment of heirs, but the interest, although contingent, is nevertheless a substantial one. The probability of an interest, or even an interest dependent upon a condition, is enough. It would hardly be contended that a contingent remainder-man or an executory devisee is not sufficiently interested in an estate to have the will proved, or to object to its admission to probate when asserting rights under a different will; nor do we think that if A. devised lands to B., with remainder over to C. in case B. should die before C., C. would be without an interest in the probate of the will or in the estate of A., although B. were yet alive. A supposed will by which A. devised real property to B. absolutely is presented for probate. C. files grounds of opposition to the probate, alleging that the will is a forgery, or is invalid for want of competency in the testator, and, to show his interest, avers that by a former will

the testator devised all his property to D. upon the condition subsequent that D. should within twenty years appear and claim it, in default of which the property should go to C., and that D. has not asserted his right, and the twenty years have not passed. We think that C. discloses an interest in the probate of the second will, although it is manifest that twenty years have not elapsed since the testator's death, and D. has yet the privilege of making his claim. The state may protect and preserve its contingent interest by contesting a suppositious will. There is some conflict in the decisions touching the nature of the interest which the contestant must possess; but we are satisfied, upon principle, that, to entitle a person to oppose a testamentary paper, it is sufficient if he discloses the existence of a contingent interest. The following text-books and cases may be cited as lending support to the doctrine: Williams on Executors, page 279; Redfield's Law and Practice of Surrogates' Courts (5th Ed.), page 88; 1 Robertson's Ecclesiastical Reports, 270; *In re Greeley's Will,* 15 Abb. Prac. (N. S.) 393; Note to *Meyer* v. *Fogg,* 68 Am. Dec. 447; *Vestry of St. John's Parish* v. *Bostwick,* 8 App. D. C. 464; *Watson* v. *Alderson,* 146 Mo. 333, 69 Am. St. Rep. 615, 48 S. W. 478; *In re Merchant's Will,* 1 Tucker (N. Y. Surrogate Repts.) 18, 19.

Unless Section 2360 of the Code of Civil Procedure may be so construed as to permit the state to contest the probate or validity of the will within one year after its probate, the possible or contingent interest which the state asserts, and the title which it might acquire by escheat, would be concluded by the probate of the will. Section 2366 of the Code of Civil Procedure provides that "if no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed." It is apparent, therefore, that if the state may not contest the will before its probate, or within one year thereafter, its rights are forever lost.

We have not been referred to, nor have we found, any re-

ported case in which the precise question here presented was decided. We find nothing in the law which requires a conclusion different from the one reached, which is certainly consonant with reason, analogy and justice.

The motion to quash the alternative writ is denied, and judgment is awarded granting a peremptory writ as prayed for.

Writ granted.

BEACH ET AL., RESPONDENTS, *v.* SPOKANE RANCH AND WATER COMPANY, APPELLANT.

(No. 1,363.)

(Submitted April 15, 1901. Decided June 3, 1901.)

Appeal and Error—New Trial—Statement—Striking Out—Appealable Order—Service—Presumption—Plaintiff's Exceptions—Defendant's Appeal—New Trial.

1. Under Code of Civil Procedure, Sec. 1722, Subd. 2, providing that appeals may be taken to the supreme court from any special order made after final judgment, an order striking out the statement on motion for a new trial is appealable.
2. Where a statement on motion for a new trial has been allowed and settled by the trial court, the appellate court will presume, in the absence of evidence to the contrary, that it was duly served on the adverse party; but this presumption does not obtain where the statement or bill upon its face shows that the service was made too late, and that seasonable objection to it was interposed upon that ground.
3. A statement on motion for a new trial which has been settled, certified and filed cannot be stricken from the record or files on the ground that the draft of the statement was not served in time.
4. Where plaintiff's bill of exceptions was made up entirely of matters occurring after the entry of final judgment, it was no part of the judgment roll, and hence would not be considered on defendant's appeal from an order denying a new trial.
5. Objections to the settlement of a statement on motion for a new trial must be incorporated in the statement, to form part of the record on appeal from the order denying the new trial.
6. Where a statement on motion for a new trial was erroneously stricken from the record by the trial court, such proceeding would vitiate the order denying a new trial, since the motion therefor rested on the statement.

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Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

ACTION by Calvin Beach, an insane person, by Elizur Beach, his guardian, and others, against the Spokane Ranch & Water Company. From an order striking out the statement on motion for a new trial, and from an order denying a new trial, defendant appeals. Reversed.

Messrs. Sanders & Sanders and *Messrs. Toole & Bach,* for Appellant.

Messrs. McConnell & McConnell, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

Two phases of this cause are reported in 21 Montana at pages 7 and 184 (52 Pac. 560, 53 Pac. 493). It is now here on appeal from an order striking from the file the statement on motion for a new trial, and from an order refusing a new trial, presented by the same record. Judgment for the plaintiffs was entered on July 3, 1897. Thereafter the statement on motion for a new trial was settled, certified as allowed, and filed. On October 15, 1898, the motion for a new trial coming on to be heard, the plaintiffs orally moved that the statement be stricken out because not served in time. The two motions were submitted together. On October 17, 1898, the court granted the motion of the plaintiffs to strike off the statement so settled, certified and filed, and at the same time denied the motion for a new trial. The defendant appeals.

1. When made after entry of final judgment, an order striking out the statement on motion for a new trial is an order from which an appeal may be taken. (Subdivision 2 of Section 1722 of the Code of Civil Procedure; *Beach* v. *Spokane Ranch & Water Co.,* 21 Mont. 7, 52 Pac. 560; *Calderwood* v. *Peyser,* 42 Cal. 110; *Sutton* v. *Symons,* 100 Cal. 576, 35 Pac. 158;

Symons v. *Bunnell,* 101 Cal. 223, 35 Pac. 770.) That such an order is appealable is well settled in this jurisdiction and in California, the statute in each prescribing that an appeal lies from any special order made after final judgment.

2. The presumption is raised by the judge's certificate allowing the statement or bill on motion for a new trial that all the precedent steps were regularly taken (*Murray* v. *Hauser,* 21 Mont. 120, 53 Pac. 99), and must be indulged in favor of the regularity of official action when the record is silent as to service or waiver and even where the statement or bill discloses that it was not served within the period prescribed by the statute and fails to show any enlargement of time. This presumption may be rebutted by the matter contained in the statement itself, —perhaps the accurate expression is that the presumption does not obtain where the statement or bill upon its face shows that the service was made too late and that seasonable objection to it was interposed upon that ground. In the absence of such disclosure, the certified statement or bill raises the conclusive presumption that a draft of the proposed statement, or a copy of the draft, was duly served. (*Murray* v. *Hauser, supra.* See Hayne on New Trials & App. p. 402, Sec. 146.)

When a proposed statement or bill on motion for a new trial appears to have been served out of time, the judge to whom it is presented may, unless waiver of default also appears, rightly refuse to settle it. (*In re Application of Plume,* 23 Mont. 41, 57 Pac. 408.) In such case he may either settle or refuse to settle. If he settles it, his certificate of allowance is not appealable. (*Henry* v. *Merguire,* 106 Cal. 142, 39 Pac. 599.) His refusal to settle and certify is also nonappealable, as was held in *Ayotte* v. *Thomas,* 20 Montana, 223 (50 Pac. 553), which case was commented on in *In re Application of Plume, supra*; and in *Whipple* v. *Hopkins,* 119 California, 349, 51 Pac. 535 (which seems to overrule *Stonesifer* v. *Kilburn,* 94 California, 33, 29 Pac. 332), it was held that even an order refusing to settle is nonappealable. As was declared in *Ayotte* v. *Thomas* and in *In re Application of Plume, supra, mandamus* is the

efficient remedy whereby to test the action of the judge in refusing to settle or certify, and although determination of the question whether *mandamus* was the remedy did not necessarily arise in the latter case (*Harding* v. *McLaughlin,* 23 Mont. 336, 58 Pac. 865), and was not essential to a decision of the former, the correct practice was indicated by each. If the judge is willing to settle the bill or statement, he should, before certifying it, permit to be incorporated into it any objections to the settlement, together with the matter in support of the objections; for example, if the defendant has served his proposed statement on the eleventh day after filing and serving notice of intention to move for a new trial, and the plaintiff, before or at the time he offers amendments, objects, or preserves his right to object, to a settlement because of delay in service or to urge the delay as a reason why a new trial should be denied, the objections should be embraced in the statement when settled; if the objection is well taken, a new trial ought to be refused upon the ground that the statement was not served in time; and where the plaintiff does not offer amendments, but objects to a settlement for the reason that the statement was not served in time, and it appears from the proposed statement, or from the facts shown at the settlement, that service was made without the time prescribed by the statute or beyond the time as enlarged by the court or judge or by act or waiver of the plaintiff, the duty devolves upon the defendant, if he would answer the objection, to incorporate into the statement such matter as may exist which will excuse or justify his seeming delay (*Wheeler* v. *Karnes,* 125 Cal. 51, 57 Pac. 893), and, unless this be done, the motion for a new trial ought to be denied. Such a statement is part of the record on appeal, and hence, if the strictly proper and technical practice be followed, it will not be stricken out of the transcript filed here, but will be examined in this court to such an extent only as may be necessary to determine that the statement was served out of time. We pause to observe that the loose practice has prevailed in this court of moving to strike from the transcript on appeal parts

of properly certified records. Such motions have frequently been granted, but, while no objection has been made to the practice, and no substantial injury resulted, it is certainly manifest that no part of a certified record on appeal should be eliminated from the transcript. None of the properly authenticated and certified papers authorized or required to be furnished to this court upon appeals ought ever to be stricken out when presented in conformity with the rules. Their place is in the record. Their effect is properly a matter for determination upon consideration of the case upon the entire record; for example, the notice of intention to move for a new trial is not one of the papers constituting the judgment roll, nor is it one of the papers described in Sections 1176 and 1738 of the Code of Civil Procedure as required to be furnished on appeal from an order granting or denying a new trial,—it is therefore no part of the record on appeal, and hence will be stricken out even if formally certified by copy, as was done in *Carr, Ryder & Adams Co.* v. *Closser,* 25 Montana, 149, 63 Pac. 1043; if, however, the notice of intention to move for a new trial be included in a statement or bill of exceptions on motion for a new trial, it is thereby made a constituent part of the record on appeal, and should not be stricken out even though it may have been served or filed out of time and must be disregarded upon the submission of the case. So with a statement or bill of exceptions used on the hearing of a motion for a new trial; when certified and brought to this court in the regular mode, it is part and parcel of the record on appeal and is entitled so to remain, although, because of some defect or invalidity, such a failure to contain a specification of the particulars in which the evidence is insufficient, it may not be capable of subserving the purpose for which it was intended or must be disregarded because a draft of the proposed statement was not served in time.

It seems to be settled that the mere form of expression or language in which the objection for want of timely service may be couched is unimportant. The objection must clearly appear, but it is sufficient if it appear by unmistakable inference so that

the party moving for a new trial may come to the settlement of the statement prepared with matter (if any there be) excusing the delay. (Hayne on New Trials & App. p. 394, Sec. 145.) In *Cottle* v. *Leitch,* 43 California, 320, the plaintiff offered an amendment to the defendant's proposed statement, "without waiving any right to move to deny said motion on the ground that defendant's statement was not filed in time," but there was nothing to show that he protested against the settlement; the court held that the objection was sufficient in form and was seasonably interposed, and that the trial court erred in granting a new trial, saying: "No particular form of reserving the objection, however, is prescribed. It is enough that it is pointed out as an objection upon which the party intends to rely in resisting the motion for a new trial. The phrase here employed, 'without waiving any right to move to deny said motion on the ground that defendant's statement was not filed in time,' though somewhat inartificial in expression, must be taken as substantially importing a reservation of the objection that the statement came too late, and the objection as thus pointed out on the record must be considered to have been overruled by the court below in granting the motion for a new trial." In *Doyle* v. *Gore,* 13 Montana, 471 (34 Pac. 846), the trial court made an order extending the plaintiff's time for serving the statement for thirty days, "without the consent, advice or stipulation of defendants or their counsel," and afterwards made other orders, which did not appear to have been by consent, further extending the time. The statement was certified, and a new trial refused. This court struck the statement from the record on appeal because the time was extended more than thirty days without defendants' consent, and the natural inference from the opinion is that no objection was made by the defendants other than the one implied by the recital to the effect that the first order was without their consent; but the record on file in this court shows that the defendants in offering amendments to the proposed statement reserved the right to object to the granting of a new trial for the reason that the statement was

not served within the time prescribed by law, and that such objections together with the matter in support of them were part of the record on the new-trial motion. In *Woodard* v. *Webster*, 20 Montana, 279 (50 Pac. 791), the objections to a statement on motion for a new trial and the matter in support of them were made part of the statement as settled and certified; and in *Power* v. *Lenoir*, 22 Montana, 169 (56 Pac. 106), the objections were made part of the statements on motion for a new trial.

It is of course manifest that where the application for a new trial is made upon affidavits and a statement or bill, the latter may have been served in time and the former not, and *vice versa*. Objections to the untimely service of affidavits must be incorporated into the bill of exceptions containing the affidavits, or the substance of them. For instance: If a new trial be granted on motion of the plaintiff, the defendant must see to it that his bill of exceptions contains his objections to the consideration of the affidavits, and the plaintiff also must cause to be inserted into the bill whatever he may have shown to excuse his seeming default in making timely service. If a new trial be refused, then the plaintiff must take the bill, into which the defendant will incorporate his objections, together with the matter in support of them, and, if a *prima facie* default in the time of service is disclosed, the plaintiff must insert whatever tends to prove that the service was made in time. It may be observed, in passing, that under Sections 1176, 1738 and 1739 of the Code of Civil Procedure, the affidavits need not be presented by a bill if the attorneys certify to the copies furnished on appeal to this court. Unless so certified by the attorneys or included in a bill of exceptions, the affidavits are not part of the record on appeal; this is the inevitable conclusion to be deduced from *State ex rel. Pierson* v. *Millis*, 19 Montana, 444 (48 Pac. 773), and *Rumney Land & Cattle Co.* v. *Detroit & Montana Cattle Co.*, 19 Montana, 557 (49 Pac. 395).

In the case at bar the statement on motion for a new trial was settled, certified as allowed, and filed. It was a record of the district court of the same dignity as a bill of exceptions and

performed a like office. It was the basis of the application for a new trial. It, together with such parts of the judgment roll as were proper to be considered in determining whether a re-examination of the issues of fact ought to be had, constituted the record upon which the court below was authorized to act. Nothing else could properly be used on the hearing of the motion. This statement the court below struck out upon the ground that the draft of the proposed statement was not served in time. The court erred. If the statement was out of time as to service, proper practice required the judge to refuse a settlement, or to settle it and then deny the motion for a new trial for the reason that timely service had not been made,—we do not mean to say that the order denying such motion must expressly indicate the ground upon which it is made, for every legitimate intendment will be indulged in support of the order; but to strike from the record or files the certified statement because not served in time, is always erroneous (*Quivey* v. *Gambert,* 32 Cal. 304; *Calderwood* v. *Peyser, supra; Lucas* v. *City of Marysville,* 44 Cal. 210), and necessarily prejudicial to the party moving for a new trial. The question is not an open one in Montana. In *Sweeney* v. *Great Falls & Canada Railway Co.*, 11 Montana, 34 (27 Pac. 347), this court, quoting from *Quivey* v. *Gambert,* and *Lucas* v. *City of Marysville, supra,* and from Hayne on New Trials and Appeals, said: "A party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which he presents it, in order that he may have and enjoy unembarrassed his right of appeal to this court. If his notice or statement has not been served or filed within time, that is a good reason why his motion should be denied when finally brought to hearing; but, under the method of procedure prescribed by the Code, it is not intended that the record upon which the motion is made may be first stricken out, and the motion then denied. Such a course is, in effect, a denial of any hearing upon the motion, and of an appeal to this court where an appeal is given. If the notice and statement, or either of them, is not filed within time, he [respondent] may safely rely upon such

facts as fatal to the motion, when brought to a hearing. If, however, as is generally the case, there is some doubt as to whether they are within time, and he does not desire to take any risk, he may propose amendments without waiving his right to object that they are not within time, by a simple preface that he does so without prejudice to his right to object at the hearing to the notice or statement upon those grounds. By so doing he waives nothing. On the contrary, he preserves all his rights in the premises. The court will then proceed to settle the statement, and at the hearing pass upon the objections so reserved. If the motion is denied, an appeal can be taken to this court, where the whole matter can be reviewed upon the record upon which the court below heard the motion. Such is the plain and obvious course prescribed by the statute, and no departure from it can be indulged, without, as we have seen, mischievous if not absurd results. * * * In the case of *Quivey* v. *Gambert* it was held that it was not good practice to strike from the files a proposed statement on motion for a new trial upon the ground that the right to move had been waived or lost, but that objections to the right of the moving party to be heard upon the motion should be made at the hearing; and the rule in this respect indicated in that case has since then been followed in this court. * * * The objection that the proposed statement was not in time must be reserved before proposing amendments; if not, it is waived, and cannot afterwards be made, either on motion to strike out the statement or in any other manner. When reserved, the objection must (if not sustained at the settlement) be incorporated in the settled statement, together with the matter in its support. If it be not so incorporated, the presumption is that the proposed statement was in time, and that all the proceedings in its preparation were regular. This presumption is conclusive; for the statement, when certified and filed like other records, imports absolute verity, and cannot be contradicted or added to by affidavits upon a motion to dismiss, or in any other manner. The objection must therefore be apparent upon the face of the statement itself; and, if so apparent, it is manifest

that it may be urged as a reason why the motion for a new trial should be denied, both in the lower court on the hearing of the motion, and in the supreme court on appeal from the order granting or refusing a new trial. This being the case, the inauguration of a separate line of proceedings by a separate motion to strike out the statement, or a motion to dismiss the motion for a new trial, is not only utterly useless, but is open to the very gave objection of involving two appeals before the motion for a new trial can get to the supreme court." Continuing, the court said: "If it be improper to strike out a statement or to dismiss the motion for a new trial, and if the moving party is entitled to a hearing of his motion, the district court in the case at bar certainly erred in refusing to hear appellant's motion. The court should have heard any objections that the plaintiff might offer to the proposed statement, and incorporated the same in the statement. A record of the whole matter would have then been preserved for the review of this court on appeal. It appears from this record that the judge below settled the statement." Upon this point the Sweeney Case is approved in *Arnold* v. *Sinclair,* 12 Montana, at page 261 (29 Pac. 1124), and we believe that since the decision in the former case the practice has conformed to the rule therein announced.

But the plaintiffs insist that this court should consider their bill of exceptions settled on December 28, 1897, showing, as they contend, that in offering the amendments to the proposed statement they reserved the right to object to a settlement and to object to the statement at every stage of the proceedings to be thereafter taken, by reason of the failure to serve it in time, that they did so object before the statement was finally settled, and that the judge overruled the objections and refused the plaintiffs' request to incorporate them into the statement which was then in process of settlement, to which the plaintiffs excepted. In answer to this contention we deem it sufficient to say that even if the plaintiffs' bill of exceptions is, by virtue of Section 1737 of the Code of Civil Procedure, a part of the

record to be furnished on appeal from the order striking out the certified statement (a question not necessary to be decided at this time), the order, tested by the principles and rules announced, was erroneous and must be reversed, for "a party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which he presents it, in order that he may have and enjoy unembarrassed his right of appeal to this court," and that the objections contained in the bill of the plaintiffs cannot be considered on appeal from the order denying a new trial, unless incorporated into, and thereby made part of, the statement as settled and certified. The statement and such parts of the judgment roll as are pertinent to the questions raised by the motion, together with copies of the order and notice of appeal, constitute the record on appeal from the order denying a new trial; since the plaintiffs' bill of exceptions was made up entirely of matters occurring after the entry of final judgment, it could not be part of the judgment roll as defined by Section 1196 of the Code of Civil Procedure, nor does it seem to be such a bill as is referred to in Section 1176, for the bill there prescribed as part of the record on appeal from an order granting or refusing a new trial is the bill taken by the party appealing. Exceptions reserved by the respondent may not be considered. (*Sherman* v. *Nason*, 25 Montana, 283, 64 Pac. 768), nor was it necessary for the plaintiffs to except to the overruling of their objections to the settlement in order to preserve the benefit of the objections, for the office of the objections and the matter in support of them was to disclose whether the statement proposed had been seasonably served,—such objections, when overruled, need not be followed by an exception. The statement, if settled, was the only legitimate place for the objections, and unless incorporated therein they form no part of the record on appeal from an order denying a new trial. They must appear upon the face of the certified statement, and it is the duty of the judge to permit them so to be shown. The order striking out the statement removed the very foundation upon which the motion for a new trial rested; there was then nothing

for the court to do but to deny the motion or to postpone the hearing of it until the supreme court had decided whether the order striking out the statement was erroneous. Perhaps it might plausibly be suggested that, although the order striking out the statement should be reversed, the order denying a new trial should be affirmed because there was before the court when the motion was submitted nothing upon which a new trial could be granted; but counsel have not made the suggestion, and we assume that the law does not intend such seemingly absurd and unjust result to be incident to the exercise of the statutory right of appeal from each order. The error committed in striking out the statement was fundamental, and vitiated the order denying a new trial.

The order striking the statement from the file is reversed, the order denying a new trial is set aside, and the cause is remanded, with directions to restore to the file the statement on motion for a new trial, to proceed in conformity with the views expressed in this opinion, and to hear and determine the motion for a new trial.

Reversed and remanded, with directions.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE MILBURN: I concur. The action of the court below in sustaining one motion and in denying the other was intended, doubtless, to be one act, to-wit, a denial of the motion for a new trial upon the ground that the statement was not filed in time. If the statement was not filed in due time, the intent of the court was correct; but to strike the statement, and then deny the motion because there was no statement, was to set up, inadvertently, I doubt not, a state of things which technically left the appellant without remedy, if we must hold the court to be correct in its ruling denying the motion for a new trial. To uphold the court under such circumstances would be to declare that, this court having held that the remedy for error in striking a statement is by appeal, to appeal is futile in every

such case. The decision in this case should not be understood as establishing a precedent, but merely as the law of this case under the peculiar circumstances thereof,—not liable to arise again; the parties having by the record and their briefs practically submitted as the only question: Can a court make an appealable order striking the statement on motion, and then, in effect, refuse to consider the motion for a new trial because it has stricken the statement, thus forcing the losing party to two appeals, neither of which can eventually avail the appellant if the court was in error when striking the statement? There is no wrong without a remedy, and in the absence of statute, rule or precedent to govern this court in the matter, I concur in the conclusion reached by Mr. Justice Pigott as just, although it appears to me that the rule, so far as it directs the court to hear the motion on new trial, would be more appropriate in *mandamus* than on appeal.

BEACH ET AL., RESPONDENTS, *v.* SPOKANE RANCH AND WATER COMPANY, APPELLANT.

(No. 1,311.)

(Submitted April 15, 1901. Decided June 3, 1901.)

Water Rights—Diversion — Injunction — Complaint—Proper and Necessary Parties—Demurrer—Jurisdiction—Bill of Particulars—Discretion — Appeal — Record—Evidence—Failure to Preserve—Findings—Review.

1. **The district court being a superior court of general jurisdiction, want of jurisdiction must affirmatively appear, to overthrow the presumption that the court had jurisdiction of the subject-matter of the action.**
2. **Property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled.**
3. **Where the complaint in a suit to restrain defendant from diverting the waters of a creek does not show that plaintiffs had not brought in all the claimants of such waters, the objection that there was a defect of parties cannot be taken by demurrer.**

4. Where property owners having the right to divert waters from a creek seek to restrain a diversion therefrom by a third person, all the property owners using such waters are not necessary parties, and hence allegations to that effect in defendant's answer were properly stricken out.
5. A complaint in an action to restrain defendant from diverting waters to the use of which plaintiffs were entitled alleged the dates and amounts of the appropriations made by the predecessors in interest of the plaintiffs, the actual and continuous use of the waters, and the usual matters in complaints of like character. *Held* not demurrable for failing to deraign plaintiff's respective titles.
6. Refusal to order a bill of particulars to be furnished is not error, unless abuse of discretion is shown.
7. Where allegations touching laches, the statute of limitations, and estoppel were denied by the replication, but the evidence was not preserved in the record, the trial court's finding on these questions will not be disturbed on appeal.

Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

ACTION by Calvin Beach, an insane person, by Elizur Beach, his guardian, and others, against the Spokane Ranch & Water Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Messrs. Sanders & Sanders and *Messrs. Toole & Bach,* for Appellant.

Messrs. McConnell & McConnell, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

Three aspects of this cause are reported in 21 Montana, at pages 7 and 184, and *ante,* page 367 (52 Pac. 560, 53 Pac. 495, 65 Pac. 106).

McClellan creek, from which the defendant diverts water, empties into Prickly Pear creek at a point above the places where the plaintiffs divert the waters used by them. The plaintiffs are owners in severalty of divers parcels of land and of the water rights used thereon, and by this action sought a decree declaring that their rights to the use of the waters of Prickly Pear creek are prior and superior to the right of the defendant

to use the waters of McClellan creek, and perpetually enjoining the defendant from diverting any of the waters of the tributary stream until the rights of the plaintiffs shall have been first satisfied. The relative priorities among the plaintiffs themselves were also sought to be established. The court found that all the water rights asserted by the plaintiffs, except one right owned by Harlow and Whitney, were superior to the right of the defendant, and that the plaintiffs were entitled to an injunction as prayed for. The relative rights of the respective plaintiffs *inter sese* were also determined, but, as such determination in no wise concerns the defendant, it will not be further noticed. Judgment was entered in accordance with the findings, and the defendant prosecutes the present appeal.

1. A demurrer to the complaint was overruled, and this is specified as error. The first ground of demurrer was that the court had no jurisdiction of the subject of the action. With respect to this ground of demurrer it is enough to say that the district court is a superior court of general jurisdiction, and, unless want of jurisdiction of the subject-matter affirmatively appears, the presumption must be indulged that it possesses jurisdiction. Inspection of the face of the complaint does not disclose lack of jurisdiction. We pass the objection that the complaint fails to state facts sufficient to constitute a cause of action with the remark that this ground is not mentioned in that part of defendant's brief devoted to the argument, and seems to be untenable.

2. Another ground of the demurrer was that several causes of action had been improperly united, in that the plaintiffs' causes of action were several and not joint. Counsel argue that because the complaint alleges ownership in severalty of the lands which they desire to irrigate, and rights in severalty to the use of the waters of Prickly Pear creek, the plaintiffs have no common interest in the subject of the action or in the relief granted. But we think it is manifest that the plaintiffs have a community of interest both in the subject of the action and in obtaining the relief demanded, and hence properly

united. In reaching this conclusion the provisions of Section 1891 of the Civil Code,* if applicable, need not be invoked. While persons may not, in the absence of a statute permitting it, join as plaintiffs in an action for damages unless there is a community of interest in respect of the injury suffered (as was practically declared in *Miles* v. *Du Bey,* 15 Montana, 340, 39 Pac. 313), the rule is and always has been that those having a common interest in the subject of the action and in preventing the defendant from doing that which will cause injury to them severally, may join as plaintiffs in a suit the object of which is to restrain him. In so far as the question of misjoinder of plaintiffs and improper union of causes is involved and the defendant is concerned, the subject of the action as stated by the complaint in the present case may be defined to be the alleged right of the plaintiffs as against the defendant to have the waters of Prickly Pear and McClellan creeks, to the extent of their appropriations, flow to their respective headgates or points of diversion,—in other words, the right to restrain the defendant from depriving the plaintiffs of the use of the waters claimed by them. The object of the action is to obtain the injunction,—the ultimate relief sought. The cause of action is the threatened wrong,—the anticipated invasion of the right. Though without community of interest in the resulting injuries, they would be commonly affected by the defendant's diversion of the waters. They were alike, or commonly, interested in preventing the defendant from diminishing the volume of water to the use of which they were entitled, and

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*"Sec. 1891. In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdicts, and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves. In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same is asked by parties to the action, the court shall hear and determine such controversy as if the same were several as well as joint."

might treat the wrong threatened by the defendant as a single cause of action, though each could maintain a suit in his own behalf alone. Two or more several owners of mills propelled by water are (to adopt the language of Section 76 of Bliss on Code Pleading) "interested in preventing an obstruction above that shall interfere with the down-flow of the water, and may unite to restrain or abate it as a nuisance; but they cannot hence unite in an action for damages, for, as to the injury suffered, there is no community of interest. There is no more a common interest than though a carrier had at one time carelessly destroyed property belonging to different persons or the lives of different passengers. The abatement or prevention of the nuisance involves but a single judgment, in obtaining which all the mill owners are interested, and by which they are all benefited; but, to enable them to unite in an action for their several damages, there must be some connection,—something in which they have a common interest." The same principle governed and was declared in *Foreman* v. *Boyle,* 88 California, 290 (26 Pac. 94); *Belknap* v. *Trimble,* 3 Paige, 577; *Emery* v. *Erskine,* 66 Barbour, 9; *Peck* v. *Elder,* 3 Sandford, 126; *Tate* v. *Railroad Co.,* 10 Indiana, 174 (71 Am. Dec. 309); and *Taylor* v. *Bay City Street Railway Co.,* 80 Michigan, 77 (45 N. W. 335),—and seems to have received general recognition; indeed, it is so clearly correct that the citation of cases in its support is hardly necessary.

3. It was also stated as a ground of demurrer that there was a defect of parties in that the plaintiffs had not brought into court all the claimants of the water of Prickly Pear and McClellan creeks, to the end that the waters might be properly distributed according to the several rights of each. The matter of the objection does not appear upon the face of the complaint, and hence could not be presented by demurrer. The answer, however, alleged that other persons were interested in the waters of Prickly Pear and McClellan creeks and were necessary parties to the determination of the rights of the plaintiffs and defendant; but it did not state facts sufficient to show that such

other persons were necessary parties, and these allegations were stricken out. In this there was no error. The statute does not require all persons who take water from the same source or stream to be made parties before a judgment may be rendered fixing the rights among the parties before the court. Counsel for the defendant fail to distinguish between the absence of necessary parties and the absence of those persons who are merely proper parties. "Defect of parties" means the absence of one or more of the necessary parties.

4. The next ground of demurrer is that the complaint is uncertain in that it omitted to describe definitely the particular appropriations under which the plaintiffs claimed,—in short, the defendant insists that the plaintiffs should have deraigned their several titles. We think the complaint is not subject to the objection. It alleges the dates and amounts of the appropriations made by the predecessors in interest of the plaintiffs, the actual and continuous use of the waters, and such other matters as are usually stated in complaints of like character, and we perceive no legal necessity for the plaintiffs further to particularize the genesis and continuity of their titles.

5. The defendant applied, upon affidavits, for a bill of particulars describing the lands alleged in the complaint to be owned by the respective plaintiffs, and stating who were the original appropriators of the several water rights asserted by the plaintiffs. If it be conceded that bills of particulars may be ordered to be furnished in actions where equitable relief only can be granted, it is nevertheless within the sound discretion of the court whether such a bill will be required, and unless an abuse of the discretion is shown it cannot be said that the court erred in refusing the application. It does not appear that in the present instance there was an abuse of discretion.

6. The defendant pleaded laches on the part of the plaintiffs in asserting their rights to the use of the waters, interposed the defense of adverse user by the defendant of the water in dispute for the period prescribed by the statute of limitations, and pleaded or attempted to plead an estoppel. The allegations

touching laches, the statute of limitations, and estoppel, are denied by the replication. The court found against each of these pleas, and since the evidence is not preserved in the record we are unable to consider the question whether it was sufficient to justify the findings, even if such inquiry may be made on appeal from a judgment. We are restricted to the inquiry whether the findings support the judgment; that they do, does not admit of doubt.

The other matters of which the defendant complains do not require special mention. We discover no prejudicial error in the judgment roll.

The judgment is affirmed.

Affirmed.

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WALTER, APPELLANT, *v.* MITCHELL, RESPONDENT.

(No. 1,317.)

(Submitted April 15, 1901. Decided June 3, 1901.)

Insane Persons—Injuries— Asylums—Negligence—Pleading.

Under Code of Civil Procedure, Sec. 745, providing that, in pleading a judgment of a court, it may be stated to have been duly given or made, a complaint alleging that an insane person was "so declared by a court of competent jurisdiction," and "was duly committed to the insane asylum," does not show the duty of the keeper of the asylum to receive and keep such person, under Political Code, Sec. 2308, providing that the insane person, together with the order of the judge and certificate of the physicians, must be delivered to the keeper of the asylum, since the allegation does not show the name of the court or that any order was made or delivered to the keeper.

Appeal from District Court, Deer Lodge County; Theo. Brantly, Judge.

ACTION by Martha Walter against A. H. Mitchell for negligently causing the death of her husband. Judgment for defendant. Plaintiff appeals. Affirmed.

Mr. J. H. Myers and *Messrs. Rodgers & Rodgers,* for Appellant.

Mr. T. J. Walsh, Mr. William H. DeWitt and *Mr. Edward Scharnikow,* for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This cause is an appeal from a judgment, and on motion to dismiss on the ground that the action has abated by reason of the death of the defendant.

The case came before the district court on demurrer to the amended complaint on the ground of want of substance. The demurrer was sustained, and plaintiff elected to abide her complaint. Judgment was thereupon rendered for the defendant. Since the appeal the defendant has died and his executrix has been substituted.

We shall not consider the motion to dismiss. It is apparent that the court was right in its ruling on the demurrer, and the judgment must be sustained.

Several reasons are set forth by defendant's counsel why the complaint does not state a cause of action. It will be sufficient to pass upon one ground only.

It is attempted to charge the defendant with responsibility for the death of the husband of plaintiff; the law invoked being Section 579 of the Code of Civil Procedure: "When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just."

It is averred in the plaintiff's pleading that defendant, being charged by the terms of his contract with the state of Montana

with the duty of keeping, caring for, maintaining, properly treating and restraining at the insane asylum at Warm Springs, Montana, all persons adjudged insane within the state, one James Roads was, on the 19th day of March, 1896, while the defendant was charged with the duty aforesaid, "an insane person, and so insane and deranged in mind as to be dangerous to life, persons and property, and was on said day so declared by a court of competent jurisdiction within the state of Montana to be an insane person, and sufficiently deranged in his mind to endanger life, person and property, and was duly committed to the said insane asylum at Warm Springs, in the county of Deer Lodge, state of Montana, and was so an inmate thereof at the time said Mitchell and Mussigbrod undertook and entered into said contract, and was committed and came into their hands as an insane person, and under their contract they undertook to keep, provide for, maintain and restrain said Roads at said insane asylum at Warm Springs, county of Deer Lodge, state of Montana."

To establish, *prima facie,* the duty of the defendant to keep the alleged insane person in his custody, and not to permit him to be at large, it was necessary to allege, or state facts to show, that the insane person was turned over to the defendant under a commitment such as the law required, from a competent tribunal, stating the name and style of the court, and that the person had been found insane and a proper subject for commitment.

Section 2308 of the Political Code, in force at the time of the alleged commitment, is as follows: "The insane person, together with the order of the judge and certificate of the physicians, must be delivered to the sheriff of the county, and by him must be delivered to the officer in charge of the insane asylum." When the officer in charge of the insane asylum has the insane person thus turned over to him, and has received the order of the judge and the certain certificate of the physicians, he stands charged with the duty to keep the insane person in his custody, and to care for, maintain and treat him as pro-

vided in the contract, presumably made in conformance with the law, and so to do until the person is lawfully discharged from the asylum.

The only allegation in the complaint as to the manner of the entry of Roads into the asylum is the language heretofore set forth, being the same substantially in each of the two counts of the amended complaint. There is not anything stated in the amended complaint which even tends to show that the officer in charge of the insane asylum ever was required by any tribunal of this state to receive or keep in his custody the man Roads. There is only one way to charge the officer with such duty, and that is to turn the insane person over to him under the order of a competent tribunal; and the order should show on its face that it was issued and made by a competent tribunal. There is nothing in the pleading to show that any such order, good or bad, was ever made by any judge, or ever received or brought to the notice of the defendant. It cannot be inferred from the amended complaint that any district judge in the state, under the law then in force, ever made any order that Roads "be confined in the insane asylum." (Section 2307 of the Political Code of 1895.) The only reference to the court is in the statement that on a certain day in March, 1896, Roads was declared insane, etc., "by a court of competent jurisdiction within the state of Montana." In pleading a judgment or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. (Section 745, Code of Civil Procedure.) The name of the court certainly must appear, and words equivalent to "duly given or made," in referring to the judgment, if a judgment is relied on, must be used. (*Harmon* v. *Comstock Horse & Cattle Co.*, 9 Mont. 243, 23 Pac. 470.) "Declared by a court of competent jurisdiction within the state of Montana" is not a phrase informing this court of the style and character of the tribunal which it can judicially notice as competent. To connect such a phrase with the words "was duly committed" by the

conjunction "and" is not to make a statement from which we can notice or properly infer that the officer received Roads upon a commitment of a court of this state, acting in the matter within its jurisdiction and directing that he be confined in the asylum, or that there was any order by any judge ever given or made, or by the officer ever had or received.

There is nothing in the pleading to show that the officer was ever charged with the duty of confining Roads. The court below did not err in sustaining the demurrer.

It is not intended that from anything said in this opinion it is to be inferred that, if the insane person was regularly committed, and was allowed to go at large as alleged, the defendant would be liable, under said section 579, in damages for the death of plaintiff's husband by the hand of the insane man allowed to go at large, as claimed by plaintiff. We do not decide this point.

Judgment affirmed.

MR. CHIEF JUSTICE BRANTLY, having tried the case in the court below, takes no part in the foregoing decision.

Motion for rehearing denied July 2, 1901.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1901.

PRESENT:

THE HON. THEO. BRANTLY; Chief Justice.

THE HON. WILLIAM T. PIGOTT,
THE HON. GEORGE R. MILBURN, } Associate Justices.

ROBINSON, RESPONDENT, *v.* MILLS, APPELLANT.

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(No. 1,271.)

(Submitted February 28, 1901. Decided June 7, 1901.)

Municipal Corporations—Excavation in Streets—Nuisance—Failure to Fill Excavation—Negligence—Liability of Person Making Excavation—Liability of Receiver—Permission to Sue Receiver—Necessity—Instructions—Notice.

1. One who creates or maintains a nuisance in a street is liable to a passenger who, being himself without negligence, is injured thereby.
2. An unauthorized excavation of a city street is a nuisance *per se*.

3. The failure to replace a city street in its former safe condition after the purpose of an authorized excavation has been accomplished constitutes a nuisance.
4. Under Political Code, Sec. 4800, Subd. 73, requiring a city street excavated by the permission of the city authorities to be placed in as good condition as formerly existed by the person making the excavation, a water company authorized to make an excavation is negligent in failing to use the highest degree of care to fill the excavation in such a manner that it will not be rendered dangerous by the action of rain, frost, etc.
5. Under Political Code, Sec. 4800, Subd. 73, a water company authorized to make an excavation is liable to an individual for injuries received through its negligence in failing in its duty to restore the street to its former safe condition.
6. A receiver of a water company, appointed after the excavation has been filled, but before the occurrence of an accident resulting from its negligence in making the fill, is liable for sueh injuries, though he has no notice of the defect, since the appointment cast on him the duty of repairing the street, and he is presumed to have knowledge of the defect.
7. Under 25 U. S. Stat. 435, Sec. 3, authorizing suits against federal receivers without the consent of the appointing court in respect to any act of the receiver in carrying on the business, an action may be brought without consent against the receiver of a water company, who continues its business, for his failure to put a street in a safe condition, though it was excavated and defectively filled by the company before his appointment.
8. An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, and required by Political Code, Sec. 4800, Subd. 73, to place the street in as good condition as before the excavation, that it is incumbent on the company to restore the street to as good condition as before the excavation, is not erroneous on the ground that the exact restoration of the street is impossible, but is to be construed as only requiring its restoration to its former safe condition.
9. An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, that it is liable for injuries resulting from its failure to put the street in its former condition, as required by Political Code, Sec. 4800, Subd. 73, is not erroneous in imposing the liability of an insurer, when considered in connection with other instructions only requiring the exercise of the highest degree of care.
10. Where instructions are upon a material point, and are in conflict, a new trial will be granted, unless it also appears that the appellant has suffered no prejudice.
11. Where conflicting instructions are upon an immaterial point, and it is not reasonably apparent that the jury have been misled, a new trial will not be granted.
12. Where a receiver is appointed for a water company which has negligently failed to properly fill an excavation made in the street, and suit is brought against the receiver for an injury resulting therefrom, after his appointment, error in contradictory instructions, some of which state his liability as dependent on notice and others as being absolute, does not authorize the reversal of a judgment for plaintiff, since the liability is not dependent on notice, and it is immaterial whether the question of notice was considered by the jury.
13. Where a receiver of a water company continues employees of the company who have formerly made and negligently filled an excavation in the street, and who attempt to remedy the defect after his appointment, their knowledge of the defect, or of facts sufficient to impart notice thereof, constitutes notice to the receiver.

Appeal from District Court, Lewis and Clarke County; S. H. McIntire, Judge.

ACTION by Lou M. Robinson against James H. Mills, as receiver of the Helena Consolidated Water Company. From a judgment in favor of the plaintiff, and from an order denying a motion for a new trial, the defendant appeals. Affirmed.

STATEMENT OF THE CASE.

Action for damages caused by a defect in a street in the city of Helena. The plaintiff alleges in her complaint that the Helena Consolidated Water Company, under authority of an ordinance of the city of Helena approved January 15, 1890, granting to the company a franchise for that purpose, was engaged in supplying water to the city and its inhabitants until March 16, 1896; that under its said franchise it had the right to lay pipes and mains through all the streets of the city, and for this purpose to make excavations in the streets, provided that it was the duty of the company, under the law and the ordinance, to restore the streets in every instance to the same safe condition in which they were before any such excavations were made; that up to March 16, 1897, the company had maintained a pipe or main under and through Eleventh avenue, one of the streets of the city; that a short time prior to that date it had made an excavation in that street near its intersection with Raleigh street, which it had thereafter only partially filled; that this excavation was negligently allowed to remain unfilled, so that the street was not again put in as good condition as when the excavation was made; that on March 16, 1897, in a suit pending in the United States circuit court for the district of Montana, the defendant was by the court appointed receiver for the corporation, and authorized to take possession of all the property and effects belonging to it, and to continue its business; that the defendant entered upon the discharge of his duties under the order, and continued the business as directed therein; that, notwithstanding his duty in that behalf, the de-

3. The failure to replace a city street in its former safe condition after the purpose of an authorized excavation has been accomplished constitutes a nuisance.
4. Under Political Code, Sec. 4800, Subd. 73, requiring a city street excavated by the permission of the city authorities to be placed in as good condition as formerly existed by the person making the excavation, a water company authorized to make an excavation is negligent in failing to use the highest degree of care to fill the excavation in such a manner that it will not be rendered dangerous by the action of rain, frost, etc.
5. Under Political Code, Sec. 4800, Subd. 73, a water company authorized to make an excavation is liable to an individual for injuries received through its negligence in failing in its duty to restore the street to its former safe condition.
6. A receiver of a water company, appointed after the excavation has been filled, but before the occurrence of an accident resulting from its negligence in making the fill, is liable for such injuries, though he has no notice of the defect, since the appointment cast on him the duty of repairing the street, and he is presumed to have knowledge of the defect.
7. Under 25 U. S. Stat. 435, Sec. 3, authorizing suits against federal receivers without the consent of the appointing court in respect to any act of the receiver in carrying on the business, an action may be brought without consent against the receiver of a water company, who continues its business, for his failure to put a street in a safe condition, though it was excavated and defectively filled by the company before his appointment.
8. An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, and required by Political Code, Sec. 4800, Subd. 73, to place the street in as good condition as before the excavation, that it is incumbent on the company to restore the street to as good condition as before the excavation, is not erroneous on the ground that the exact restoration of the street is impossible, but is to be construed as only requiring its restoration to its former safe condition.
9. An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, that it is liable for injuries resulting from its failure to put the street in its former condition, as required by Political Code, Sec. 4800, Subd. 73, is not erroneous in imposing the liability of an insurer, when considered in connection with other instructions only requiring the exercise of the highest degree of care.
10. Where instructions are upon a material point, and are in conflict, a new trial will be granted, unless it also appears that the appellant has suffered no prejudice.
11. Where conflicting instructions are upon an immaterial point, and it is not reasonably apparent that the jury have been misled, a new trial will not be granted.
12. Where a receiver is appointed for a water company which has negligently failed to properly fill an excavation made in the street, and suit is brought against the receiver for an injury resulting therefrom, after his appointment, error in contradictory instructions, some of which state his liability as dependent on notice and others as being absolute, does not authorize the reversal of a judgment for plaintiff, since the liability is not dependent on notice, and it is immaterial whether the question of notice was considered by the jury.
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fendant neglected to fill the excavation aforesaid until May 24, 1897, though the unsafe condition of it was well known to him, or should have been well known to him if he had exercised reasonable diligence to ascertain its condition; that on the date last mentioned the defendant, through his agents and servants, cast dirt and soil into the excavation, so that it appeared to be filled up, but that the work was so negligently done that a hole or space was left underneath the surface of the street, by means of which the street was rendered dangerous; that on the evening of May 24, 1897, the plaintiff, without knowledge of the unsafe condition of the street, and without negligence on her part, drove her carriage over the same; that the horse which she was driving broke through the surface of the street over the hole or space, and thereupon became frightened and ran; that the carriage in which the plaintiff was riding was drawn against a fire plug near by, overturned and demolished, and by reason thereof plaintiff was thrown violently to the ground, cut about the head and face, and seriously hurt internally; that from these injuries she continues to suffer and be sick and sore and lame; and that by reason thereof, and the destruction of her carriage, she has suffered damages in the sum of $2,000.

The defendant, admitting that the Helena Consolidated Water Company made the excavation in question in the conduct of its business, denies any negligence or omission of duty in the premises by the company by reason of which the street was rendered or left defective or dangerous. He denies any negligence or omission on his part after he took charge of the property and business of the company, and alleges that, if any defect in the street existed by reason of any default of duty on the part of the company, the same was not known to him, and could not, by reasonable diligence on his part, have become known to him, so that he was burdened with any duty to the plaintiff because of his continuance of the business of the company under his trust. He also alleges contributory negligence on the part of the plaintiff.

This appeal is from a judgment in favor of the plaintiff for $1,250 and from an order denying the defendant's motion for a new trial.

Messrs. Clayberg & Gunn and *Mr. William Wallace,* for Appellant.

Mr. T. J. Walsh, for Respondent.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the Court.

1. When plaintiff had concluded the introduction of evidence, counsel for the defendant moved the court to direct a verdict in his favor on the ground that the complaint did not state a cause of action against him, for the reasons that the duty, if any, to remedy any defect in the street occasioned by the excavation therein by the water company, was a duty owing to the city of Helena, and to no one else, and that there was no duty resting upon the defendant to remedy such defect. The court overruled the motion, and defendant assigns error.

Subsection 73 of Section 4800 of the Political Code provides: "The city or town council has power: To permit the use of streets and alleys of the city or town for the purpose of laying down gas, water and other mains, but no excavation must be made for such purpose without the permission of the council, and the streets and alleys must be placed in as good condition by the person making the excavation as they were before the excavation was made, and the mains laid down, and in default thereof the council may order the same to be done at the expense of such person."

The argument of counsel upon the first ground of motion is that under the statutes of Montana governing the organization of cities, and from which they derive their powers, exclusive jurisdiction over and the right to control the streets and alleys rests with the city; that the council may, under the provision quoted, grant permission to a water company to make such excavations in the street as the nature of its business requires, but that the primary duty to the public to properly fill such excavations and restore the streets to their former condition is cast in each instance upon the city, and not upon the corpora-

tion acting under such permission or license. In other words, however much such a corporation may be guilty of negligence and disregard of its obligation to the city under the license, it is not liable to the passenger upon the street for any injury resulting from such neglect of duty. If, therefore, a person injured has any recourse, it is against the city, which alone is liable, and the corporation which has caused the injury suffers no other penalty or liability than that of having the street restored at its expense. As conclusive of this contention, counsel cite among other cases: *City of Rochester* v. *Campbell,* 123 N. Y. 405, 25 N. E. 937; *Taylor* v. *Railroad Co.,* 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457; *City of Keokuk* v. *Independent Dist. of Keokuk,* 53 Iowa 352, 36 Am. Repts. 226, 5 N. W. 503; *City of Hartford* v. *Talcott,* 48 Conn 525, 40 Am. Rep. 189; *Hill* v. *City of Fond du Lac,* 56 Wis. 242, 14 N. W. 25; *Kirby* v. *Boylston Market Association,* 14 Gray 249, 74 Am. Dec. 682; *City of St. Louis* v. *Connecticut Mut. Life Ins. Co.,* 107 Mo. 92, 28 Am. St. Rep. 402, 17 S. W. 637. In *City of Rochester* v. *Campbell* it appears that the charter of the city imposed upon the owners of lots the duty of keeping in repair the adjoining sidewalks, and to clear away therefrom all snow and ice or other obstructions. In case of default on part of the owner, the city authorities, after notice to him, could have the repairs or other work done at his expense. The sidewalk adjoining defendant's premises had fallen into disrepair, and by reason of this condition a passenger was injured. The city, having been compelled to pay a judgment for damages, sought to fix liability upon the defendant for the amount so paid. It was held that the city could not recover. This conclusion was based upon the theory that the primary obligation to keep the streets in order rested with the city; that the obligation cast upon the abutting lot owner was subservient to that resting upon the city, to be performed or neglected, at the pleasure of the city authorities; and that it was inconsistent with this power of exclusive control in the city and its resultant primary duty to suppose a primary duty cast upon the

defendant also. The principle of this case is supported by the other cases cited, and by the current of authority, but it has no application here. Under the common law no duty rested upon the lot owner to keep the adjoining streets or sidewalks in repair. In every case where this duty is cast upon the owner it is by virtue of a provision of the charter or an ordinance of the city under its charter powers, and the liability arising from neglect is to the city, and not to the public. It is equally as well settled by the current of authority that one who creates or maintains a nuisance in a street is liable to a passenger who, being himself without negligence, is injured thereby. (2 Dill. Mun. Corp. Sec. 1032; *City of Rochester* v. *Campbell,* and other cases cited; *Village of Port Jervis* v. *First Nat. Bank of Port Jervis,* 96 N. Y. 550; 15 Am. & Eng. Enc. Law (2d Ed.) 433; *Webster* v. *City of Beaver Dam* (C. C.) 84 Fed. 280; *Toutloff* v. *City of Green Bay,* 91 Wis. 490, 65 N. W. 168.) This principle was recognized by this court in *Cannon* v. *Lewis,* 18 Mont. 402, 45 Pac. 572, where it was held that the defendant was liable for injuries to a passenger who fell into a cellar way of the defendant, left open in the sidewalk upon a street in the city of Butte. A clear distinction exists as to the relations of the parties to the public in the two cases, and their resultant duties are based upon wholly different considerations.

An unauthorized excavation or other obstruction in a street is a public nuisance *per se.* None the less does one made by permission of the city, or under authority of a license or contract, become a nuisance, if it is left unguarded during the progress of the work, or if the street is not restored to its original condition when the purpose of the excavation has been accomplished. In the latter case the doing of a lawful thing in an unlawful way makes it a nuisance, in the same way as if it were a nuisance in the beginning.

Under the section of the statute quoted, the city council had the power to grant to the water company the right to lay its pipes and mains. This carried with it the obligation to keep

them in repair. Without permission thus granted by the city, every excavation in the street would have been a nuisance in the first instance, and the company would have been liable for any injury caused by it, without reference to the question of negligence. Acting under the permission granted, it would become guilty of maintaining a public nuisance if it negligently left an opening unguarded, or if, at the end of the work, it left the street in such condition that it was then unsafe, or would become so by the operation of natural causes,—such as the effect of rains or frost upon the earth. The obligation assumed by the water company was, therefore, carefully to guard the work during its progress, and to restore the street when the work was ended, so far as human foresight could go, to as safe a condition as that in which it found it at the time the excavation was begun. In support of these views we cite: *Drew* v. *River Co.,* 6 Car. & P. 754; *Johnson* v. *Friel,* 50 N. Y. 679; *Dillon* v. *Gaslight Co.,* 1 McArthur, 626; *Southern Exp. Co.* v. *Texarkana Water Co.,* 54 Ark. 131, 15 S. W. 361; *Reeves* v. *Larkin,* 19 Mo. 192; *McMahon* v. *Railroad Co.,* 75 N. Y. 235; *City of Brooklyn* v. *Brooklyn City R. Co.,* 47 N. Y. 475, 7 Am. Rep. 469. In *Johnson* v. *Friel, supra,* the language of the court is: "It was not enough that defendant left the work in a proper and safe condition for the time, but it was his duty to anticipate and provide for the natural effect of rains upon earth excavated and replaced, to see that during and after the rain it was in proper and safe condition, or that safeguards were placed about it, or watchmen kept near it, or such measure of prudent forethought adopted to prevent damage to the traveling public."

If the injury complained of here had occurred before the water company surrendered its property to the receiver, it is idle to say that the water company would not have been liable. In the light of the principles stated, it was its duty not only to restore the street to the condition in which it found it, but also thereafter to anticipate and guard against the effect of natural causes which would probably operate to render it again

dangerous because of the fact that the earth had been disturbed by the company's necessary work.

Substituting the water company as defendant in place of the receiver, the allegations in the complaint are sufficient to state a cause of action against it.

The argument upon the second ground of the motion is that, as the receiver did not cause the defect in the street, he cannot be held liable, no matter what liability may attach to the water company. It is undoubtedly the rule that a receiver cannot be held liable for an injury occasioned by a wrong or neglect of duty by the corporation whose property has subsequently been placed in his hands. A receiver is the arm of the court; the property is placed in his hands for safekeeping pending the litigation; but if under the direction of the court he continues the business of the corporation, his duty and liability begins from the date at which he assumes control and begins his operations. He is substituted for the corporation, and from that moment he assumes toward the public the duties and liabilities of the corporation. If the property is out of repair, and a due regard for public safety requires it to be put in repair, the duty is cast upon him, and for the neglect of such duty he becomes liable to any person injured by such neglect. Undoubtedly the ordinance granting the franchise to the water company to lay pipes and mains in the streets of the city was in the nature of a contract between the company and the city, the consideration of which on the part of the company was that the company would in each instance restore the streets to the condition in which it found them. In receiving the franchise it undertook to perform the resultant duty to the city of restoring the streets. (*People* v. *Chicago & A. Railroad Co.*, 67 Ill. 118; *Village of Port Jervis* v. *First Nat. Bank of Port Jervis, supra.*) A failure on its part in this duty to the city necessarily resulted in the creation of a nuisance. The assumption of the business of the company by the receiver carried with it the assumption also of all the duties owed by the water company to the city as well as to the public. If the excavation in ques-

tion in this case had not been properly repaired at the time the receiver assumed charge of the property, then the obligation devolved upon the receiver, he having succeeded to the exclusive control and management of the property and business, to restore the street and thus perform his duty toward the city and protect the public against injury. The duty of the corporation to the public was a continuing one, and the receiver, as successor in title of the water company, was bound to remedy the defect caused by the water company. (*Vaughan* v. *Railway Co.*, 72 Hun, 471, 25 N. Y. Supp. 246.) It cannot be said that the receiver could operate the property under the franchise of the company and still not be subject to any of the obligations of the company. The receiver was bound to know the condition of the property. He was bound to know of the ordinary operation of the laws of nature, and was therefore presumed to have knowledge that the defect existed in the street at the time he assumed possession of the property. The complaint, while not a model of pleading in so far as it attempts to charge the receiver, states facts from which the inference of duty on his part must necessarily arise. This is especially true under the circumstances of this case, the defendant having proceeded to trial without any seasonable attack upon the pleading, and having treated it as sufficient.

2. The court having refused to direct a verdict on the grounds just discussed, counsel then moved for a dismissal of the action on the ground that it did not appear either from the allegations in the complaint or from the evidence that the plaintiff had first obtained from the United States circuit court leave to sue its receiver. Counsel argue that, as an attempt is made in this case to hold the receiver for a wrong done by the water company, and not "in respect to any act or transaction of his in carrying on the business connected with" the property of the company, permission to bring the action should have been obtained. This contention proceeds upon the same theory as that involved in the second ground of the former motion. Of course the lower court should have sustained this motion, as

well as the former, if it became apparent during the progress of the case that the injury complained of could not be chargeable to any act or omission on the part of the receiver. The receiver could not be held for any wrong done by the company, and in the absence of sufficient allegation and proof to show that the injury complained of by the plaintiff was the result of a violation or neglect of duty by him, the action could not be maintained against him either with or without permission from the court appointing him. As we have seen, however, the complaint states, *prima facie,* a cause of action against him for his neglect of duty in connection with the management of the business in his hands, and therefore a case is presented which falls clearly within the provision of the statute (25 U. S. Stat. 435, Sec. 3) authorizing suits to be brought against a federal receiver without leave from the appointing court. (*Meyer* v. *Harris,* 32 Vroom 83, 38 Atl. 690; *Stoltz* v. *Railroad Co.,* 104 Wis. 47, 80 N. W. 68; *McNulta* v. *Lochridge,* 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796; *Texas & P. Railroad Co.* v. *Johnson,* 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81.) The section of the statute cited, which is the same as Section 3 of the Act of Congress of March 3, 1887 (24 U. S. Stat. 553), was construed in *McNulta* v. *Lochridge, supra,* and it was there held to apply not only to causes of action arising out of the conduct of the receiver himself or that of his agents, but also to those arising out of the conduct of his predecessor.

3. Counsel further contend that even if it be conceded that the receiver was properly made defendant, instead of the water company, the court erred to his prejudice in several of the instructions submitted to the jury.

It appears from the evidence that on or about December 21, 1896, one of the mains of the water company on Eleventh avenue near its intersection with Raleigh street had sprung a leak. The company, having been notified, sent workmen to repair it. To do so it was necessary to excavate a trench down to the main and about seven feet along the street. The main was near the sidewalk. At that season the weather was cold, and as fast as

the dirt, wet by the escaping water, was thrown out it froze hard. When the repairs were completed the trench was refilled with the frozen dirt, which had to be broken up into lumps. It was not possible at that time to replace all the dirt, its condition and that of the weather rendering tamping or puddling impracticable. As one of the witnesses says: "We filled the hole, * * * and rounded it up, arching it a little." So it remained without further attention until "some time in the spring," when the foreman of the company went to see the condition of it. The earth was not then thawed. Later, in March, one of the employees of the company examined the trench, and finding it somewhat settled threw in the dirt left at the sides. Later again this same employee was notified by the city street commissioner of the depression at that point. He thereupon hauled some dirt and threw it into the excavation. There was some evidence tending to show that on the day of the accident an employee of the company again leveled up the trench. There was also evidence tending to show that it was not unusual, when such a trench had been filled as was this one, for the dirt to form into a crust at the top, which not settling with the body of the dirt in the trench, concealed a cavity beneath, so that when the weight of a team came upon it it would break through. This was shown to be a condition in this instance in addition to the depression at the surface, and the breaking through this crust by plaintiff's horse was the occasion of the accident. The plaintiff stated that she saw as she drove by the place earlier in the evening that some one had recently filled the trench, and for that reason did not take care to avoid the place as she was returning home, when the accident occurred. The receiver was appointed on March 16, and at once entered upon the discharge of his duties. He did not give his personal attention to the repairing of pipes, but left this duty to the foreman and other employees of the company whom he retained in his service.

Upon these facts the court submitted to the jury, among other instructions, the following, in substance:

(1) That under the ordinance of the city of Helena the

water company had the right to make excavations in the streets of that city for the purpose of laying down or repairing pipes, but that it must, within a reasonable time after having opened the street, restore it to as good condition as it was before, and if it failed to do so, and any person was injured in consequence, the water company became liable for any damages he may have suffered.

(2) That the defendant receiver had the same right to open the streets, and was under the same obligation to restore them to their former condition within a reasonable time; and that it was further his duty, in case the water company had before he became receiver opened the streets at any place, and had not restored them to as good condition as they were before, to put them, at the places so opened, in as good condition as they were before, provided he knew, or by the exercise of reasonable diligence ought to have known, that such street had been at any place left in a defective condition.

(3) That it was not necessary, in order that the plaintiff recover in this action, that it appear that the defendant had, or ought to have had, personal knowledge of the defect claimed to have existed in the street; but if the agent or servant of the defendant, as receiver, who was charged with the duty of restoring the street to its former condition in case it needed work of that character, knew, or in the exercise of reasonable diligence ought to have known, of the defective condition of the street, the law imputes knowledge of the condition of the street to the defendant, and in such case the plaintiff may recover.

(4) That it was the duty of the defendant himself to acquire knowledge, so far as the same could be acquired in the exercise of reasonable diligence, of any defects in the street occasioned by the water company, or to depute some agent or servant to do so; and if in the exercise of reasonable diligence such agent or servant ought to have known of the defect, then the defendant as receiver became liable to any person having suffered any injuries in consequence of such defect, if, within a reasonable time after its discovery by such agent, the defect is not remedied.

(5) That, though the water company was authorized under the ordinance to make excavations in the streets, yet if it did so it was bound at its peril, so far as human foresight could provide, to restore it to a safe condition, and that it would be liable for all injuries which might ensue and that could have been prevented by the exercise of the very highest degree of watchfulness and care; and that upon the defendant taking possession of the property of the water company it was his duty to exercise, either by himself or by his servants, the highest degree of watchfulness and care. with a view of informing himself of any dangerous places in the streets occasioned by excavations made by the water company, and if, in the exercise of such high degree of watchfulness and care, the defendant, as receiver, either personally or through his agents, had or ought to have learned of any dangerous place in the streets so made, it was his duty to exercise the highest degree of care and caution to restore the same to the condition they were in before the excavations were made.

It is said in criticism of the first paragraph of these instructions that it is physically impossible to so fill an excavation in a street as to restore the earth to its former condition. We do not think that as a matter of law this is true. It may be that under some circumstances of season and locality the statement would hold good, but ordinarily it would not. The ordinance was not introduced in evidence, but it is admitted in the answer that the complaint sets it out according to its substance. We presume therefore that it enjoins no greater burden than does the section of the statute quoted, which authorizes it. In any event the statute declares the duty of the company to be to place the streets in as good condition as they were before the excavation was made. Construed according to its obvious meaning, it requires the streets to be restored to their former safe condition. To say that they must be put in identically the same condition would indeed require the performance of an impossibility, for nothing short of divine power could do this. Barring natural difficulties at certain seasons interfering with

an immediate permanent restoration, we can see no insuperable difficulty in the way of restoring the streets to a safe condition; and, as we have seen, duty in this connection also requires attention to the operation of well-known natural causes, and imposes the burden of guarding against their effect upon earth disturbed and replaced. Standing alone, and without an implied construction placed upon it by the other paragraphs of the instruction, such as paragraph 5, it might seem to impose upon the company and the defendant the duties and liabilities of an insurer; but, in the light of this latter and other instructions implying that safety to the public is the object to be accomplished, the jury could not reasonably have been misled as to its meaning. These remarks also dispose of the contention that this paragraph is in conflict with paragraph 5, in that the first makes the defendant an insurer while the latter only requires him to use the highest degree of watchfulness and care, and to guard against injury so far as human foresight can go. As we have seen, however, the first paragraph is in the language of the statute, and, presumably, of the ordinance, while the latter gives this language the construction which it is evident the legislature intended it to have; for we cannot admit that this body intended to constitute the water company an insurer against every possible injury. The terms "safe condition" and "good condition" are used interchangeably. From this point of view there is no conflict. We think paragraph 5 states correctly the degree of care which it was incumbent upon the company and the receiver to exercise. Our views on this point have already been stated in considering the complaint in the first paragraph of this opinion. In addition to the authorities there cited in support of these views, we cite also: *Chicago* v. *Robbins,* 2 Black, 418, 17 L. Ed. 298; *Homan* v. *Stanley,* 66 Pa. St. 464, 5 Am. Rep. 389; *McCamus* v. *Gaslight Co.,* 40 Barb. 380; *Nelson* v. *Godfrey,* 12 Ill. 20; *Baumeister* v. *Markham,* 101 Ky. 122, 39 S. W. 844; and Wood on Nuisances, Sec. 273. Mr. Wood, in the section cited, states the rule as follows: "Excavations made by authority must be

properly guarded, and every means adopted for protection of public. So, where a person has been authorized to make excavations in a street by the proper authorities, or to make coal openings or cellar flap, he is bound at his peril, so far as human foresight can provide against accident, to keep them in a safe condition; to keep them properly guarded; to have them properly constructed and securely fastened; and is liable for all injuries that ensue that could have been prevented by the exercise of the very highest degree of watchfulness and care."

The same criticism upon paragraphs 2, 3, and 4 is disposed of by the remarks just made upon paragraph 1.

Complaint is also made that paragraphs 2, 3, and 4 are in direct conflict with paragraph 5, in that the former state the correct rule as to the degree of care to be exercised by the receiver to discover the condition of streets after assuming control of the water plant, while the latter is altogether erroneous. That the conflict exists is clear, and it is impossible to reconcile it; but it does not therefore follow that the defendant is entitled to a new trial. The rule is recognized by this court that where the instructions are upon a material point, and are in conflict, a new trial will be granted, unless it also appears that the defendant has suffered no prejudice. (*State* v. *Rolla*, 21 Mont. 582, 55 Pac. 523; *Heilbronner* v. *Lloyd*, 17 Mont. 299, 42 Pac. 853.) If, however, the conflicting instructions are upon an immaterial point, and it is not reasonably apparent that the jury have been misled, a new trial will not be granted. In our opinion it is not a material question in this case whether the receiver had notice of the condition of Eleventh avenue at the time of the accident. It is not sought to hold him personally liable for any act of willful neglect, but merely to hold him, as the successor of the water company, for an omission of duty in his trustee capacity. At the time he entered upon the discharge of his duties the defect in the street existed. He took the franchise of the company and its property, and continued its operations. The duty to restore the street was a continuing one. The company was, by the order appointing him, stripped

of its power and resources and was unable to perform the duties which primarily appertained to it. The street at the time was in such a condition as to be a public nuisance, or to become one as soon as the frost disappeared; and, as it would have been the duty of the company to foresee and provide against what would almost certainly occur, so it was his duty to use the same precaution, because he was substituted for the company, with all the duties and responsibilities which would have appertained to it had he not been appointed. We do not see how, under *City of Rochester* v. *Campbell, supra,* he could have escaped liability to the city had it been compelled to answer for the accident; indeed, certain propositions assumed in that case to be settled law would hold him liable to the city. Much less, under the principle of *Vaughan* v. *Railway Co.* and *Johnson* v. *Friel, supra,* can he escape liability to a passenger under the plea that he had no notice of the situation, brought about by natural causes, after his appointment. He cannot be heard to say that an omission of duty on his part should be brought to his notice before he could be held to answer for it. (Elliott on Railways, Sec. 1112; *Texas & Pac. Railway Co.* v. *Geiger,* 79 Tex. 13, 15 S. W. 214; *Bonner* v. *Mayfield,* 82 Tex. 234, 18 S. W. 305.) From this view of the case the instructions complained of were not material, and though conflicting are not ground for a new trial. It is clear that the jury could not have been misled by them, for it is unimportant whether they considered the question of notice at all. Assuming, however, that notice to the receiver was necessary, the evidence stated warranted the finding that he had such notice, or should have had it; for it is clear that his employees had notice, and more than once attempted to repair the defect. They knew that the excavation had been made. They knew that the earth had not all been returned to the excavation. Some of their various attempts to remedy the defect were made after the appointment of the receiver. Knowledge of these employees was notice to him of the existence of a condition which, under some circumstances, would become a menace to the public. The fact that

all the earth had not been replaced, and the subsidence of the surface, were a warning that there was possible danger; and it was imperative that the defect be sought out and remedied. Notice of the apparent condition carried with it notice of the actual condition,—that is, that the earth had been disturbed during the frost season, and a dangerous condition was likely to intervene; and the duty owed to the public required the exercise of the utmost diligence to guard against injury. So it is that it does not matter which rule of diligence was applied by the jury. They were justified in finding that the receiver was put upon notice of the condition, which through his neglect resulted in the injury of which the plaintiff complains.

It is urged by appellant that only reasonable or ordinary diligence should be required of the company, or the defendant receiver, to guard against injury caused by defects in the street such as the one in question; and counsel cite *King* v. *Miles City Irrigating Ditch Co.*, 16 Mont. 463, 41 Pac. 431, 50 Am. St. Rep. 506; *Hopkins* v. *Butte & Montana Commercial Co.*, 13 Mont. 223, 33 Pac. 817, 40 Am. St. Rep. 438, and *Sweeney* v. *City of Butte*, 15 Mont. 274, 39 Pac. 286. But all of these cases are easily distinguishable in fact and principle from the present case. In *King* v. *Miles City Irrigating Ditch Co.* the question involved was the degree of care required of a ditch owner to keep his ditch in repair so as to prevent the water from breaking over and overflowing his neighbor's land. It was held that the defendant was not an insurer, but should be held to the exercise of ordinary care in the management of his ditch. *Hopkins* v. *Butte & Montana Commercial Co.*, was an action for damages against defendant resulting from an overflow of water occasioned by a jam of logs which he was engaged in floating down a stream through plaintiff's ranch to its mill. It was held that the defendant was engaged in a lawful business, and that it was bound to use ordinary care only to prevent injury to the lands of the plaintiff during the pursuit of its business. The principle of these cases does not apply to the present case, for the reason that the water company has no right to make any

excavation in the streets except upon permission of the city council, and then only upon condition that they be restored after a reasonable time to as good condition as they were in before. A failure to restore the streets rendered the company guilty of maintaining a nuisance; therefore it should be held at least to the highest degree of care in the performance of this condition. The last case cited by counsel (*Sweeney* v. *City of Butte*) was an action against the city of Butte for damages caused by plaintiff's falling into a cellar under a sidewalk through defective and dangerous trapdoors set in the sidewalk. It was held that under such circumstances the city authorities were bound to use all reasonable care to see that the person so permitted to occupy the sidewalk kept it properly guarded and protected, so that passengers would suffer no injury; and that, under the facts of the case, the defendant was properly held liable for the injury. None of these cases is authority for the position assumed by appellant in this case. The rule of diligence applied in this latter case is the ordinary rule by which municipal corporations are held liable for failure to keep streets in a reasonably safe condition for the protection of the public.

Several other questions were presented in the argument, but the alleged errors upon which they are based are not of sufficient merit to demand notice.

Let the judgment and order denying the motion for a new trial be affirmed.

Affirmed.

Motion for rehearing denied July 1, 1901.

LEONARD, RESPONDENT, *v.* CITY OF BUTTE, APPELLANT.

(No. 1,334.)

25 410
e26 186

25 410
27 510

25 410
e34 284

25 410
35 237
36 500

(Submitted May 14, 1901. Decided June 17, 1901.)

Municipal Corporations—Sidewalks—Defects—Notice to City—Questions for Jury—Instructions.

1. In a sidewalk composed of cement blocks, four were broken and replaced. The new blocks were so hard and smooth that 100 persons slipped and fell thereon in about a year, and 25 fell within two months of plaintiff's accident. *Held,* that the question whether the walk was defective and in a dangerous condition was for the jury.
2. Where four blocks in a cement sidewalk differed from the others, and were so slippery that 100 people had fallen thereon within a year, and 25 within two months,—one of them being seriously hurt, and another being helped up by a policeman,—and the place had grown so notorious that it caused amusement among the passers when persons fell there, the question whether the city authorities had notice, actual or constructive, of the defect, was for the jury.
3. Where, in an action against a city for injury caused by a defective sidewalk, the jury are correctly instructed as to the duty of the city relating to walks, but the court, in a paragraph relating to the notice to the city of a defect, declared its duty to be to keep sidewalks "in good condition and safe," instead of in a reasonably safe and good condition, the verdict should not be set aside on that ground, since it was manifest the jury could not have been misled by the charge as a whole.
4. Where in an instruction the court inadvertently uses expressions which assume the existence of a fact in issue, but, taking the whole charge together, it does not appear that the appellant has suffered prejudice thereby, such instruction will not work a reversal of the judgment.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Philip P. Leonard against the city of Butte. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Mr. Edwin M. Lamb, for Appellant.

Mr. M. J. Cavanaugh and *Mr. Bernard Noon,* for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

This action was brought by the plaintiff to recover damages for personal injuries alleged to have been caused by a defect in a sidewalk upon one of the principal streets of the defendant while plaintiff was traveling thereon. There were a verdict and judgment for plaintiff. The appeal is from the judgment and an order denying a new trial. The questions presented to this court are whether the evidence is sufficient to justify the verdict, and whether the court misdirected the jury to the prejudice of the defendant.

1. Counsel for the defendant contends that the evidence is insufficient to justify the verdict, in two particulars: (1) In that no defect was shown to exist in the sidewalk in question; and (2) in that, though a defect was shown to exist, it was not known to the defendant.

From the evidence it appears that the walk in question was upon the east side of Main street, between Quartz and Granite streets, and that there was a great deal of travel over it. It was constructed in 1892 of cement flags about three feet square. The grade of the street and walk at that point is considerable. From some imperfection in construction four of these flags, covering a space about six feet square near the middle of the walk, in front of Mullins' grocery store, became chipped and broken to such an extent that in the spring or summer of 1895 they were removed and four others substituted in place of them. The substituted flags differed in appearance from the rest of the walk; no coloring matter having been used in their construction, as was the case with those first laid. They seemed to be unusually hard and smooth, some of the witnesses stating that they had a hard, greasy or oily appearance and were as smooth as glass. The employees in Mullins' store first observed persons slipping and falling at this point in the fall of 1895; after that time such occurrences were very frequent. One witness states that while he was working for Mullins, between November, 1895, and January, 1896, he saw as many as twenty-five persons fall there; on some of these occasions he saw city officials in the neighborhood, and once a policeman

assisted a woman who had fallen. Another states that he saw as many as one hundred persons slip and fall there at various times before the accident by which plaintiff was injured. These accidents always occurred at the point where the four new flags had been laid, and became so frequent that they were the occasion of a great deal of mirth to other persons in the vicinity who observed them. This witness went to work for Mullins on November 3, 1895; to prevent accidents to Mullins' employees and customers, as well as others, he put dirt or sawdust upon this portion of the walk two or three times a day; he himself fell there and broke his kneecap on July 31, 1896. Accidents always befell passengers going down the street; those going up experienced no trouble. The condition of the weather made little or no difference. This condition of the walk remained unchanged until after plaintiff fell there on the morning of December 11, 1896, when, under the direction of Mullins, this witness and another of his employees cut grooves with a chisel in the surface of these four flags at right angles with the line of grade. After this no accidents occurred.

Under the ordinances of the city, abutting lot owners are required to construct and keep in repair the walks in front of their property. The construction and repairs are required to be of such material as is prescribed by ordinance or resolution of the city council, and to be done to the satisfaction of the street and alley committee or the street commissioner, under the superintendence of the city engineer. It is the duty of the city marshal and all policemen to report to the street commissioner any defects in sidewalks, and, in case of accident, to report the same to the city attorney, with the names of the witnesses. The city engineer is required to fix the grade of the streets and sidewalks, and to see that all work of construction and repairing is properly done. These ordinances were in force at the time of the accident. In this particular instance neither the original construction nor the work of repair was ever formally approved by the city authorities, all having been done under contract let by the abutting owner. A great deal

of evidence was introduced by defendant tending to show that the flags used in repairing the walk were of good materials, properly proportioned, and that the walk was as good as any other of similar construction in the city. There is no proof tending to show that any person made complaint to any of the city authorities about the condition of the alleged defect, though it does appear that such complaint was made to the owner of the building from whom Mullins leased his store.

Counsel argue that upon this evidence this court should declare, as a matter of law, that no defect was shown to exist in the sidewalk in question. The position thus assumed is untenable. There is no controversy upon the evidence but that passengers descending along this walk experienced difficulty in retaining their footing at the point where the repairs had been made, and often met with disaster. We are unable to see why a smooth and slippery condition of a walk, caused wholly by the peculiar construction of it, or resulting from wear by use of the material of which it is composed, may not be a defect, as well as a condition resulting from a fault in construction or from natural decay. A sidewalk upon which a person cannot step without peril of limb from slipping and falling seems equally as defective as one upon which he is constantly in danger of falling from stumbling, or in which there are unguarded openings rendering passage over it dangerous. It was held by the Illinois court of appeals in *City of Centralia* v. *Baker,* 36 Ill. App. 46, that it was a question for the jury whether a sidewalk on the principal street of the village was defective and dangerous because one of the boards out of which it was constructed was so warped by sun and rain as to stand a small distance above the general level, thus presenting an obstruction against which a passenger was liable to stumble and fall. In *Cromarty* v. *City of Boston,* 127 Mass. 329, 34 Am. Rep. 381, the court considered a case in which the injury was caused by a passenger falling upon a portion of a walk rendered smooth and slippery by constant use. The particular portion of the surface of the walk in question was formed by a "Hyatt patent cover,"

made partly of iron and partly of glass, and presumably designed to close some opening in the walk. Counsel for the defendant contended that inasmuch as the general surface of the walk was level, and the "cover" was level with the rest of the walk, there was no evidence of a defect. The court said: "This position cannot be maintained. It cannot be said, as matter of law, that smoothness and slipperiness of a sidewalk, resulting from the condition of the surface of the material of which the walk is made, and not dependent on nor resulting from atmospheric influences, may not render the walk so unsafe and inconvenient for travelers thereon as to be defective and out of repair, within the meaning of the statute. If a walk is constructed of material so smooth and hard that travelers shod in the ordinary way are defeated or obstructed in their attempts to pass over it by inability to get the hold upon it with their feet which is necessary to their walking forward, or the want of which causes them to lose their balance and fall, such walk cannot be said, as matter of law, to be safe and convenient. And if, in a sidewalk, the chief part of which is in proper condition for travel, a small part of the surface is constructed of material different from the remainder, and so smooth and slippery that a foot traveler, stepping suddenly upon it from the portion otherwise constructed, necessarily or probably slips, and is likely to fall, it cannot be said, as matter of law, that such walk is not defective." These remarks are entirely pertinent to the present case. Here the claim is made by plaintiff that the walk was defective. In support of this claim it is shown that many persons had slipped and fallen in the same place,—some twenty-five in the course of two months, and one hundred during about a year's time. One sustained a serious hurt, though accustomed to pass over it in the course of his employment every day, perhaps many times each day. Attempts were made to remove the trouble by putting dirt and sawdust upon the dangerous spot. Finally, when the surface was grooved by Mullins' employees, the difficulty disappeared. We think that the facts shown present a question for the jury, and

not for the court, and that the case falls within the general rule that whether or not there is in fact a defect is a question for the jury. (*Sullivan* v. *City of Oshkosh,* 55 Wis. 508, 13 N. W. 468; *McCloskey* v. *Moies,* 19 R. I. 297, 33 Atl. 225; *Harris* v. *Inhabitants of Great Barrington,* 169 Mass. 271, 47 N. E. 881; *Todd* v. *City of Troy,* 61 N. Y. 506.)

We are also of the opinion that the evidence warranted a finding that the city authorities had notice of the defect. Part of the evidence showing that a policeman observed an accident on one occasion, and lent his assistance to aid a woman who had fallen, tended to show actual notice to the city. It was his duty, under the ordinance, to report to the street commissioner if there was a defect, and, presumably, he performed his official duty. (*Twogood* v. *City of New York,* 102 N. Y. 216, 6 N. E. 275; *Rehberg* v. *Mayor, etc. of the City of New York,* 91 N. Y. 137, 43 Am. Rep. 657; *City of Denver* v. *Dean,* 10 Colo. 375, 3 Am. St. Rep. 594, 16 Pac. 30; *Farley* v. *Mayor, etc. of the City of New York,* 152 N. Y. 222, 57 Am. St. Rep. 511, 46 N. E. 506; Elliott on Roads and Streets (2d Ed.) Sec. 629.) But, even without this item of evidence, and conceding that no duty rested upon the policeman to make report, we think the facts and circumstances shown by the evidence properly presented a case for the jury as to constructive notice. The defect, if it was one in fact, had existed for about a year. It had grown to be quite notorious in the neighborhood, so that it caused amusement among the passengers when persons fell there. At least one serious accident had happened there. It was on a street where there was much travel, and so many falls had occurred there that dirt or sawdust had been cast upon it from day to day to increase the friction and thus lessen the danger. It is hardly conceivable that this condition should exist for a whole year without being in some way brought to the attention of some of the officers of the city whose duty it was to remedy it. In any event, the evidence is sufficient to be submitted to the jury upon the question of constructive notice. "Wherever the defect has existed for such a length of

time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of the defect, notice thereof will be presumed. Having means of knowledge, and negligently remaining ignorant, is equivalent to knowledge. It is generally for the jury to determine, as a question of fact, whether a city has notice or not, although it may become a question for the court where the facts are undisputed, and but one reasonable inference can be drawn from them." (Elliott on Roads and Streets, Sec. 626.)

2. Counsel for defendant criticise paragraph 2 of the instructions on the alleged ground that it declares it to be the duty of a city to keep sidewalks "in good condition and safe" for the passage of persons traveling over them. We understand the rule to be that a city is bound only to use reasonable care to keep its streets and sidewalks in a reasonably safe and good condition for travel (Dillon on Mun. Corp. Sec. 1019), exercising reasonable care in inspecting them to discover any defects therein (*Id.* Sec. 1025). Having observed both of these precautions, reasonable attention being had to the effects of natural deterioration and decay, the authorities will have discharged their full duty. The paragraph under consideration is inaccurate, in that it omits to state that reasonable care, only, is the measure of duty. Yet, when all of the instructions are read together, we think it is apparent that the jury could not have been misled by this error. Paragraph 2 was intended to be a statement of the rule of law as to notice to the city authorities before liability could attach, and it is in connection with the statement of this rule that the inaccurate expression was used. Other paragraphs state clearly and accurately the law relative to the duty of the city generally, and as applied to this particular case. Upon the whole of the instructions upon this point, we think it is clear that the defendant suffered no prejudice.

Counsel also find fault with paragraph 3 of the instructions, in that it assumes the existence of the alleged defect, instead

of leaving the question of its existence to be determined by the jury. In the preceding instruction the court had clearly and explicitly left it to the jury to find whether there was a defect in the walk as alleged, and whether the city had actual notice of it, and, if not, whether, under all the circumstances, and by the exercise of reasonable diligence, it should have had notice of it. In paragraph 3 the expressions "the defect" and "the unsafe condition" were inadvertently used, the court thus speaking for the moment as if the alleged defect stood as an admitted fact. The word "any" should have been used for "the" in each of the expressions; but, taking the whole charge together, we do not think the defendant has suffered prejudice. The cause seems to have been carefully tried, and, except in the particulars mentioned, the charge was correct, and fairly submitted to the jury all the questions involved in the case.

The judgment and order appealed from are affirmed.

Affirmed.

PAPE ET AL., APPELLANTS, *v.* CHAUVIN-FANT FURNITURE COMPANY, A CORPORATION, RESPONDENT.

(No. 1,341.)

(Submitted May 17, 1901. Decided June 17, 1901.)

Costs—Disallowance—Tender or Payment of Part of Sum Due, After Suit Brought—Finding for Plaintiff—Stipulations.

1. Where defendant paid $1,095 after suit brought, and in a stipulation admitted a balance due plaintiff of $6.64, but made no offer to allow judgment for that amount, it was error to refuse plaintiff a judgment for costs on his obtaining judgment for the $6.64, under Code of Civil Procedure, Sec. 1851, providing that costs are allowed of course to plaintiff on a judgment in his favor, in an action to recover money or damages, exclusive of interest, where he recovers over $50.
2. Tender or payment after suit brought, to be effectual to prevent further costs, must be of the sum due, with costs accrued up to that time, and interest, if interest be due.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Frederick Pape and William Schleiger against the Chauvin-Fant Furniture Company. From a judgment in favor of plaintiffs, but without costs, they appeal. Reversed.

Mr. John A. Shelton, for Appellants.

Mr. Charles O'Donnell, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

This suit was brought on February 4, 1895, to recover the price of goods, wares and merchandise theretofore sold and delivered to defendant on account by plaintiffs, and various other persons whose several claims were assigned to plaintiffs. From the amended and supplemental complaint it appears that judgment was demanded for $1,398.16. After the issues were made up, and on June 18, 1895, the parties filed in the cause, in the district court, a written stipulation containing the following paragraph: "It is hereby stipulated and agreed by and between the above-named plaintiffs and defendant, that defendant above named has paid, to apply in the above-entitled action upon the demand therein, the sum of $1,095, and that there yet remains unpaid in said action the sum of $6.64, admitted by defendant to be due therein on said demand, but plaintiffs claim a greater sum, which is disputed." This stipulation contained the further agreement that the cause should be continued until the determination by the supreme court of an appeal then pending, which involved the validity of attachment proceedings instituted in this suit at the time it was begun, and that thereupon "the amount due plaintiffs and costs of this action shall be determined according to law." The appeal to this court was prosecuted under the title of *Omaha Upholstering Co.* v. *Chauvin-Fant Furniture Co.*, and the opinion rendered therein is reported in 18 Mont. 468, 45 Pac. 1087. Before the issues were

finally made up in the district court, such proceedings were had in the cause in that court that the present plaintiffs were substituted for the original plaintiff, and the title of the cause was changed accordingly. After the appeal was determined, and on October 22, 1897, the cause, under its present title, came regularly on for trial in the district court, sitting without a jury. Evidence was heard, and the cause submitted, and taken under advisement until May 20, 1898, when the court ordered judgment entered for plaintiffs for the balance of $6.64, admitted to be due under the stipulation, and for costs of suit. On the following day, however, and it seems before the entry of the judgment, the court modified the order and directed judgment entered for the balance found due, but without costs, which was accordingly done. This action was taken in the absence of, and without notice to, plaintiffs' counsel, though he had served upon defendant's counsel and filed with the clerk a memorandum of his costs and disbursements claimed, as required by Section 1867 of the Code of Civil Procedure. The cause is brought here on appeal from the judgment.

Several errors are assigned and argued in the brief filed by appellants, but upon the hearing the only question urged upon our attention and submitted for decision was whether the district court erred in refusing to include in the judgment plaintiffs' costs and disbursements in the district court.

The court made no formal findings, but the judgment as entered contains the findings "that the said defendant herein has paid to the plaintiffs named in the amended and supplemental complaint on file herein the sum of $1,095, to apply on the causes of action set forth in the said amended and supplemental complaint, which said payment was made after the commencement of this action, and after the filing of the said amended and supplemental complaint; and the court further finds that the further sum of $6.64 is due by the defendant to the said plaintiffs, and the court finds for the plaintiffs and against the defendant, in the sum of $6.64, and costs of suit." So far as we can judge upon the record before us, but for the

payment made after the beginning of the action the plaintiffs would have been entitled to recover judgment for $1,101.64. Under the circumstances, we think it was error to disallow plaintiffs their costs. Section 1851 of the Code of Civil Procedure provides: "Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases:

* * * (3) In an action for the recovery of money or damages, exclusive of interest, when plaintiff recovers over fifty dollars." The rule of law as to tender after suit brought is that, to be effectual to prevent further costs, it must be of the sum due, with costs accrued up to that time, and interest, if interest be due. In the absence of such a tender, the defendant may offer to allow judgment against him, under the provisions of Section 1800 of the Code of Civil Procedure. In the latter case the judgment, as in case of a tender, must include costs up to the time of making it. So, in case of payment after suit begun, the plaintiff is entitled to costs accrued up to the date of payment, unless he stipulates to the contrary.

Under the stipulation which was introduced, the balance due, after payment of the sum of $1,095, was to be determined according to law; that is, by a trial. The costs were to abide the issue, whether the balance was greater than that admitted. No offer was then or afterwards made to allow judgment for that amount. Had this been done conformably to the provisions of Section 1800, *supra*, an acceptance of it would not have relieved the defendant from costs already accrued, but its rejection would have excused him from the payment of those subsequently accruing. As it is, we think the plaintiffs were entitled, as a matter of course, to have judgment for all costs and disbursements lawfully taxable up to and including the entry of judgment.

The cause is remanded to the district court, with directions to set aside and vacate the judgment entered on May 21, 1898, and to render and cause to be entered a judgment in favor of plaintiffs for $6.64, the balance found due, together with costs to be ascertained or taxed according to law.

Remanded.

SHACKLETON, APPELLANT, v. ALLEN CHAPEL AFRICAN METHODIST EPISCOPAL CHURCH, A CORPORATION, ET AL., RESPONDENTS.

(No. 1,340.)

(Submitted May 16, 1901. Decided June 17, 1901.)

Mortgages — Corporations — Trustees — Officers — Notice— Foreclosure—Parties.

1. Where a second mortgage of church property did not purport to be the deed of the corporation, but was executed by the president and secretary of the trustees individually, and duly recorded, it was not necessary, in order to foreclose their equitable right to redeem, to make the second mortgagees parties to an action to foreclose a prior mortgage on the church property, since the second mortgage was not constructive notice that it was on such property.
2. Deeds executed by an agent or attorney in fact should be executed in the name of the principal.
3. An instrument executed by a stranger to the title, whose authority does not appear of record, is not within the purview of the recording acts.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION to foreclose a mortgage by J. W. Shackleton against the Allen Chapel African Methodist Episcopal Church, S. V. Kemper and another. From a judgment in favor of defendants Kemper, plaintiff appeals. Affirmed.

Mr. Robert Coombe, for Appellant.

Assuming that the evidence shows a title in defendant, S. V. Kemper, prior and superior to plaintiff's lien, nevertheless the undisputed evidence in this case shows that plaintiff has an equitable mortgage upon the premises, and such an interest therein as will entitle him to redeem, and not having been made a party to the foreclosure suit, brought by S. V. Kemper, he still has a right to foreclose his mortgage, and to a decree permitting him to redeem from said Kemper. (*Carpenter* v. *Brenham,* 40 Cal. 221.) Plaintiff's equitable mortgage was of record and

contains a correct description of the mortgaged premises, and shows that the property belonged to Allen Chapel A. M. E. Church. It was therefore notice to Kemper sufficient to put him on enquiry as to plaintiff's rights in the premises, and any decree entered in, for or of defendant, Kemper, to which plaintiff was not a party, would be a nullity as to him. (*Eversdon* v. *Mayhew*, 85 Cal. 8; *Anderson* v. *Baughman*, 7 Mich. 69; *Eversdon* v. *Mayhew*, 24 Pac Rep. 382; *Frisco Land & Irrigation Co.* v. *Rowell*, 80 Cal. 114; *Miller* v. *Hicken*, 92 Cal. 229; *Shere* v. *Larsen*, 22 Wis. 142; *Malbon* v. *Graw*, 46 Pac. 330.)

Mr. Robert McBride, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

On the 6th day of July, 1892, the Allen Chapel African Methodist Episcopal Church, a corporation created under the laws of Montana, executed to Simeon V. Kemper its mortgage of land to secure the payment of its promissory note of that day for $3,500. On the 15th day of August, 1892, the mortgage was recorded in the office of the county clerk and recorder of Silver Bow county, Montana, in which county the land mortgaged is situate. On the first day of October, 1892, a mortgage purporting to be "between the trustees of the Allen Chapel A. M. E. Church, of Butte City, Montana, party of the first part, and J. W. Shackleton and F. S. Leck, of same place, party of the second part," was made by which "the said parties of the first part for and in consideration of the sum of two hundred and twenty-eight dollars * to them in hand paid by the said parties of the second part * have granted, bargained, sold and conveyed * unto the said parties of the second part, and to their heirs and assigns forever," the land which had been theretofore mortgaged to Kemper. The instrument was declared to be a mortgage to secure the payment of a certain promissory note "executed by the said first parties to the second

parties, which said note is in words and figures as follows, to-wit:

"$228.00. Ootober the first, 1892.

"Six months after date, we promise to pay to the order of J. W. Shackleton and F. S. Leck, two hundred and twenty-eight dollars, at one per cent. interest, from date, per month. Value received.

"SILAS FAGAN,

"Chairman of Trustees of Allen Chapel A. M. E. Church.
"ANDREW HENSON, Secretary."

The attesting clause and subscriptions thereto are as follows:

"In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"SILAS FAGAN, (L. S.)

"Chairman of Trustees of Allen Chapel A. M. E. Church.
"ANDREW HENSON, Secretary. (L. S.)"

This mortgage was recorded in the office of the county clerk and recorder of Silver Bow county on the 6th day of October, 1893. Leck afterwards assigned his interest as mortgagee to the plaintiff Shackleton. On July 30, 1895, Kemper brought an action against the corporation to foreclose his mortgage. Shackleton was not made a party. A decree of foreclosure was entered on the 4th day of November, 1895, and the property was sold by the sheriff to Kemper. No redemption having been made within six months after the sale, the sheriff on the 6th day of May, 1896, executed a conveyance of the property to Kemper. Thereafter and on the 2d day of July, 1896, the plaintiff, Shackleton, brought this action to foreclose the mortgage of October 1, 1892, making Kemper and his wife parties and asserting that he has the right to redeem the property, for the reason that at the time the action by Kemper was commenced the plaintiff, Shackleton, had a mortgage of record upon the property executed by the Allen Chapel African Methodist Episcopal Church. The trial resulted in a judgment in favor of the defendants Kemper, but so far as the transcript shows

no determination was made with respect to the rights of the plaintiff as against the corporation defendant. From the judgment in favor of the defendants Kemper, and from an order overruling his motion for a new trial, the plaintiff appeals.

There is but one question presented upon this appeal, or rather the determination of one question in favor of the defendants Kemper will render unnecessary the decision of any other. The question is: Was the record of the mortgage of October 1, 1892, constructive notice to Kemper that the Allen Chapel African Methodist Episcopal Church, a corporation, had mortgaged to Shackleton the land theretofore mortgaged to Kemper? If it was, the plaintiff has the right to redeem; if it was not, then, as against the defendants Kemper, the plaintiff is without any right whatever.

It is not pretended that Kemper had actual notice of the mortgage to Shackleton. The plaintiff bases his alleged right of redemption upon the constructive notice which he contends was imputed to Kemper by the record of the mortgage to Shackleton and Leck. It is provided in Section 1290 of the Code of Civil Procedure, which is substantially Section 358 of the First Division of the Compiled Statutes of 1887, that "no person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action."

The trustees or directors are the governing or managing agents of a corporation. The president and secretary, when acting within the scope of their authority, are agents of the trustees or directors and of the corporation. Its business affairs must be transacted through agents. The common-law rule that deeds executed by an agent or attorney in fact should be executed in the name of the principal has not been abrogated in

Montana. The rule, in part, finds expression in Section 1504 of the Civil Code.

The mortgage to Shackleton does not purport to be the deed of the corporation; it is not named as the grantor, nor did it, so far as the instrument discloses, execute or intend to execute the grant. The mortgage is declared, in terms, to be between the trustees of the "Allen Chapel A. M. E. Church" of the one part and Shackleton and Leck of the other. The trustees are described as the parties of the first part, and the mortgage recites that it is executed as security for the payment of a promissory note by Silas Fagan and Andrew Henson, chairman and secretary, respectively, of the trustees. Instead of affixing the corporate seal, the chairman and secretary affixed their own seals, expressly declaring that they do so. Of course, we do not mean to say that if in the body of the mortgage the corporation appeared to be the grantor, the fact that the persons after subscribing their names used their own seals, or omitted to use any seal whatever, would prevent the instrument from being the deed of the corporation, it not appearing that the corporation was required to attest its action under seal (Section 1963 of the Fifth Division, General Laws, Compiled Statutes of 1887). Nor do we hold that as between Shackleton and the corporation and persons having notice of the facts, the mortgage might not be upheld in equity upon proof being made that Fagan and Henson were duly authorized to act for the corporation; but this consideration has no weight with respect to Kemper. Upon its face the mortgage to Shackleton was the act of persons other than the corporation which made the mortgage to Kemper; the record of the Shackleton mortgage could not constitute notice, for the design and purpose of the recording acts are to give notice that the owner, general or special, of the property has conveyed or incumbered it. The record is notice to purchasers from or under the same grantor, and an instrument executed by a stranger to the title whose authority does not appear of record, is not within the purview of the acts. This seems clear. (*Hagar* v. *Spect*, 52 Cal. 579; Wade on the

Law of Notice, Sec. 205; Devlin on Deeds, Sec. 713.) The *prima facie* presumption is that the note and mortgage in question were the acts of the trustees, or of Fagan and Henson, and not of the corporation; in order to rebut the presumption evidence would be required. As being more or less pertinent and as supporting this conclusion we cite: *Taft* v. *Brewster,* 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; *Klopp* v. *Moore,* 6 Kan. 27; *Fullan* v. *West Brookfield,* 9 Allen (Mass.) 1; *Stinchfield* v. *Little,* 1 Mo. 231, 10 Am. Dec. 65; *Brinley* v. *Mann,* 2 Cush. (Mass.) 337, 48 Am. Dec. 669; *Hatch* v. *Barr,* 1 Ohio, 390; *Chamberlain* v. *Pacific Woolgrowing Co.,* 54 Cal. 103; *Richardson* v. *Scot River W. & M. Co.,* 22 Cal. 150; Secs. 5015-5107, Thompson on Corporations. Since the mortgage to Shackleton was not upon its face the deed of the corporation which granted to Kemper, its inscription upon the county records was without efficacy as notice to Kemper, the holder of the prior mortgage, of any lien upon the land embraced therein, and hence did not charge him with the duty of making Shackleton a party defendant in the action to foreclose the prior mortgage. It necessarily results that the judgment rendered in the action of Kemper against the Allen Chapel African Methodist Episcopal Church is conclusive against Shackleton.

The judgment and the order denying a new trial are affirmed.

Affirmed.

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e27 172
25 427
28 16
e28 568
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36 89
25 427
41 37

MONTANA ORE PURCHASING CO., APPELLANT, *v.* BUTTE & BOSTON CONSOLIDATED MINING CO. ET AL., RESPONDENTS.

(No. 1,318.)

(Submitted April 16, 1901. Decided June 24, 1901.)

Highway — Prescription — Limitations — Injunction — Evidence—Discretion.

1. Plaintiff for several years had hauled the ore from its mine across defendant's land to a public highway. The public had traveled across the land where they chose since 1887, but the particular road since traveled by plaintiff was constructed by persons hauling its ores under contract in 1893. *Held*, that plaintiff had not acquired a prescriptive right to such road under Compiled Statutes of 1887, Div. I, Sec. 29, fixing a limitation of five years for actions to recover real property, when the Code of Civil Procedure took effect, July 1, 1895, which, in Section 483, prescribes a limitation of ten years, since such right over uninclosed land cannot be acquired until the travel has been confined to a particular way for the length of time prescribed by such statutes.
2. Where, on an application for an injunction *pendente lite* to restrain defendants from obstructing a private road which plaintiff claims by prescription, the evidence is conflicting, the finding of the trial court that such right has not been acquired, and order denying an injunction, should be affirmed.
3. Under Political Code, Sec. 2600, providing that roads laid out or erected by others than the public, dedicated or abandoned to the public, are public highways, such dedication or abandonment is not shown by mere user until the period of limitations of actions to recover real property has elapsed.
4. Where, on an application for injunction to restrain the obstruction of a road, the trial court admitted irrelevant evidence, its order should not be reversed on that ground, if there was sufficient competent evidence to sustain its findings, since it will be presumed that its decision was based on such competent evidence.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by the Montana Ore Purchasing Company against the Butte & Boston Consolidated Mining Company and others. From an order refusing a preliminary injunction, plaintiff appeals. Affirmed.

Messrs. McHatton & Cotter and *Messrs. Clayberg & Corbett*, for Appellant.

Messrs. Forbis & Evans, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

This action was instituted by the plaintiff for the purpose of obtaining a perpetual injunction restraining the defendants from obstructing a certain way or road used by plaintiff in hauling lumber and other supplies to its mines and in conveying the ores extracted therefrom to its smelter. The smelter is situated near Meaderville, in Silver Bow county, northeast of Butte. The public highway leading from Butte to Meaderville runs first east from Butte, and then north, passing immediately to the west of the smelter. A short distance to the south of the smelter the road in controversy leaves this highway, and leads off in a northwesterly direction, passing over the Never Despair, Michael Devitt and other patented mining claims belonging to the defendant Butte & Boston Consolidated Mining Company, to the Rarus and Johnstown mines, which belong to the plaintiff. The Michael Devitt claim lies in an easterly and westerly direction contiguous to and west of the Never Despair claim, and the road in question, entering upon the former claim near the southeast corner, passes diagonally over it towards the northwest. At the time this suit was brought, the defendant corporation, through the other defendants, its officers and agents, was engaged near the southeast corner of the Michael Devitt claim in making excavations for the foundations of a boiler house and ore bins, which it intended to use in hoisting and storing ore from a shaft sunk on the Never Despair claim, a short distance to the east. The complaint alleges that these operations of the defendants had seriously obstructed the road, and deprived the plaintiff of a free passage over it; that the said road had for many years been used and traveled by the public generally with the knowledge and acquiescence of the defendant corporation and its predecessors, and in common with them; that the same is a public highway by prescriptive use; and that the obstructions created by the defendants would result in special damage to plaintiff, in that they cut off all access

to its mines, and necessitate a complete suspension of its operations. The plaintiff also alleges that it has a special easement in the said way by prescriptive use by itself and its predecessors.

The defendants admit that their operations interfere with free passage over the road, but deny that the road is a public highway by prescriptive use or otherwise, or that plaintiff has a special right or easement therein. Upon the filing of the complaint the district court made an order to show cause why an injunction *ad litem* should not issue. Upon a hearing the order was discharged, and the injunction denied. The plaintiff has appealed.

1. The principal question presented to this court is whether the district court abused its discretion in refusing to issue the injunction as prayed. We do not think it did.

Plaintiff did not claim, nor did it make any effort to show, that the authorities of Silver Bow county had ever attempted to establish by the ordinary legal proceedings, or to assume control over, the road in controversy, or that plaintiff had ever secured a right of way therein under the provisions of the statute regulating the procurement of access by private roads to mines and mining claims. (Compiled Statutes 1887, Fifth Division, Secs. 1496-1507; Political Code, Secs. 3630-3641.) Its effort was directed altogether to an attempt to show adverse user by the public for the period prescribed by law as sufficient to bar a recovery of the land occupied by the road, and, in case the evidence fell short of establishing this, to show that the user by plaintiff had been exclusive and adverse for this period; so as to establish the right to such a private way as is provided for under the sections of the statute cited, and thus to bring the case within the principle of *State* v. *Auchard*, 22 Mont. 14, 55 Pac. 361. Under the law as declared in that case, a highway by prescription exists only where the general public has used the way without substantial interruption for the period of time fixed by the statutes of limitation applicable to lands. By analogy, and of necessity, the same rule applies to private

ways provided for under the statutes cited. Prior to July 1, 1895, when the present Code went into effect, the limitation fixed by law was five years. (Comp. St. 1887, First Division, Sec. 29.) Under the new Code the limitation was changed to ten years. (Code Civ. Proc. Sec. 483.) The new limitation was also made to apply to all causes of action not already barred under the old law, the same as if they had arisen after the Code went into effect, except that the time already elapsed should be counted as a part of the limitation under the Code. (Code of Civil Procedure, Secs. 3455, 3456, 3482; *Guiterman* v. *Wishon*, 21 Mont. 458, 54 Pac. 566; *Sherman* v. *Nason*, 25 Mont. 283, 64 Pac. 768.) This suit was brought on April 29, 1898. Under the rule established by the Code, if the limitation had expired on July 1, 1895, plaintiff's rights were not affected by the Code provision; but, if the limitation had not then expired, the new limitation applies, and the time already elapsed on July 1, 1895, should be counted as a part of the ten-year limitation. The plaintiff's evidence tended to show that there had been a considerable amount of travel over the Michael Devitt and the adjoining claims, beginning as early as 1887 or 1888, from the neighborhood of the smelting works, and from along the line of the Meaderville road in the direction of plaintiff's mines, and thence towards the northwest to other mines and to the village of Walkerville, and that there had existed from that time a well-defined way for teams. It is thus seen that this evidence tended to establish a highway by prescription. On the other hand, however, defendants submitted evidence tending to show that the whole country in that neighborhood was open and uninclosed; that people generally traveled over it in any direction they chose; that no well-defined track or way existed anywhere in the neighborhood of the road in question until the summer of 1893, when parties who had made a contract with plaintiff to haul ore from its mines to its smelter constructed the road for their own convenience, without aid or direction from plaintiff. The evidence thus presented a sharp conflict, and it is apparent that the district court found in favor

of defendants' contention. Upon this theory of the case the contention that the road is either a public or private way by prescriptive use cannot be sustained; for, if the way did not become fixed and defined until 1893,—and we cannot say that the district court was wrong in finding this to be the fact,—the new limitation must be applied, and the plaintiff's contention fails. For we understand the rule to be that, where the claim is founded upon use only, without color of title, it must appear that the use has been confined to the particular way for the full time of the prescribed limitation. (*State* v. *Auchard, supra.*) Travel by the public generally over uninclosed land, but not confined to any particular way, will not inaugurate such an adverse claim as will presently ripen into a right which may be asserted against the owner. (*State* v. *Auchard, supra;* Elliott on Roads and Streets (2d Ed.) Sec. 175.) The evidence being in conflict, and the finding of the district court thereon not appearing to be the result of an unwise exercise of discretion, this court will not interfere. That court saw and heard the witnesses, and we would not be justified in saying that it was an abuse of discretion to give credit to those who testified in behalf of defendants.

Upon the whole case the defendants made a reasonable showing that the plaintiff's claims are unfounded in fact, and, under the rule heretofore declared by this court in similar cases, the order will not be reversed on the ground that the trial court might have entertained a different view. (*Parrot Silver & Copper Co.* v. *Heinze,* 25 Mont. 139, 64 Pac. 326, and cases cited.)

Counsel argue that, as it appears from the evidence that the road in controversy had been in use for more than five years at the time of its obstruction, it is a public highway within the meaning of Section 2600 of the Political Code. This section was construed in *State* v. *Auchard, supra,* as "a remedial statute, curing irregularities, but not supplying jurisdiction, where none was acquired, in the creation of the roads, and as recognizing the existence of highways by prescription when they had

been used or traveled by the people generally for the period named in the statutes of limitation." It is not susceptible of the construction contended for by the plaintiff.

2. The court admitted, over the objection of the plaintiff, evidence tending to show the character of the buildings which the defendants were engaged in erecting, and the amount intended to be expended thereon. Counsel for appellant contend that this evidence was irrelevant and immaterial, and that the action of the trial court in admitting it was prejudicial. We are not prepared to say that the evidence was not properly admitted, but, conceding that plaintiff's position is correct, we think the error without prejudice. Presumably the trial court based its findings upon such of the evidence before it as was competent, excluding from consideration such as had no weight or relevancy. The other evidence in the record, the competency of which is unquestioned, was sufficient to justify the findings, and the order will not, therefore, be reversed. (*Merchants' Nat'l Bank* v. *Greenhood*, 16 Mont. 395, 41 Pac. 250, 851.)

The order is affirmed.

WITHERS, RESPONDENT, *v.* KEMPER ET AL., APPELLANTS.

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31 15
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(No. 1,331.)

(Submitted May 13, 1901. Decided June 24, 1901.)

Evidence—Appeal—Review on Appeal from Judgment—Statement on Motion for New Trial—Bill of Exceptions—Presumption—Errors of Law.

1. **In a suit to foreclose a mortgage, it was proper to refuse to strike out the testimony of the plaintiff at the close thereof on the ground that her testimony was incompetent, immaterial and irrelevant, in that she had failed to produce, or account for the nonproduction of, the note on which the action was based; plaintiff's testimony being not only as to a search for the note, but as to circumstances tending to support her allegation that the note had not been paid; and, as the testimony for plaintiff was not all in, the court had no knowledge but that further evidence might be introduced, showing a search.**

2. Code of Civil Procedure, Sec. 1736, enacts that any statement used on a motion for new trial may be used on appeal from a final judgment, equally as upon appeal from the order granting or refusing a new trial. *Held,* that a statement on a motion for a new trial cannot render the question whether or not the evidence was of sufficient weight to sustain the decision of the court or the verdict of the jury reviewable on appeal from the judgment, since such question could only be reviewed on appeal from an order granting or denying a motion for a new trial.
3. A bill of exceptions can raise only errors of the court in its rulings upon points of law.
4. It is presumed on appeal from a judgment that the court has passed upon all the points raised by the bill of exceptions.
5. To attack a judgment as not supported by the findings is to raise a question of law.
6. To attack a decision on the ground that there was a total failure of any evidence is to raise a point of law.
7. Under Code of Civil Procedure, Sec. 1736, on an appeal from the judgment the court cannot consider any questions raised in the statement on motion for a new trial which it could not consider on a bill of exceptions regularly in the record on appeal from the judgment.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

SUIT by Mollie Withers against S. V. Kemper and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Mr. E. B. Howell, for Appellants.

Testimony concerning loss of papers is immaterial until it is first shown that the paper in controversy was among them. To prove the loss of any document it is first necessary to prove its previous existence. (Jones on Evidence, Sec. 211; *Weatherhead* v. *Baskerville,* 11 How. 329; *Oliver* v. *Persons,* 76 Am. Dec. 657.) The admission of the answer of the original making of the note is by no means an admission of its existence subsequent to the date when the answer alleges it was paid. "The law does not presume nonpayment of a note when due, but payment, unless the note is produced or other evidence repelling the presumption of law when the note cannot be produced." (*George* v. *Ludlow,* 66 Mich. 176; *Bassett* v. *Hathaway,* 9 Mich. 28.) A judgment of foreclosure should only be

rendered upon the request of the holder of the note, and upon his either producing it or accounting for its nonproduction by clear and conclusive proof. (Jones on Mortgages, Sec. 1308 (Fourth Edition); *George* v. *Ludlow*, 66 Mich. 176, 33 N. W. Rep. 171; *Young* v. *McKee*, 13 Mich. 552; *Hungerford* v. *Smith*, 34 Mich. 300; *Mickle* v. *Maxfield*, 42 Mich. 310; *Vanauken* v. *Hornbeck*, 14 N. J. L. 178; *Bergen* v. *Urbahn*, 83 N. Y. 49.)

Messrs. McHatton & Cotter, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This case is before this court on appeal from the judgment, the appeal from the order denying a new trial having been dismissed.

The plaintiff sued the defendant S. V. Kemper, his wife, and one other,—a grantee of said Kemper,—in foreclosure of a mortgage on certain real estate; the note secured by the mortgage being a negotiable instrument, and having fallen due on May 28, 1891, in this state.

The defendants admit all the allegations of the complaint, except that it is denied that there is anything unpaid on the note; the answer alleging payment of the full sum of the face and interest of said note as having been made by Kemper on the day of the maturity thereof. The court below, on motion of plaintiff, held that the burden of proof was upon the defendants to show payment. The note and the mortgage—the latter being duly recorded—were not produced upon the trial; but the plaintiff introduced evidence tending to show that search had been made for the instruments, and that they were lost. No reference was made in the pleadings to the inability of the plaintiff to produce the note or mortgage, and no demand was made by defendant Kemper that he be indemnified against any lawful claim thereon.

The appellants, in their brief, rely upon fifteen assignments

of error. The first and second of the alleged errors are as to admission of testimony, and are, in our opinion, without merit. The fifth, sixth, seventh, eigth, ninth and tenth charge error in instructions; and, without passing upon the question whether or not material error in instructions to a jury in an equity case is ground for reversal, when the court adopts material findings of the jury which were influenced by such instructions, it is sufficient to say that the only error which appears in the charge to the jury, in the parts complained of, pertains to the question of agency of the husband of the plaintiff, and his power to receive the money in payment of the note and to discharge the debtor, which question it is not necessary to consider at all in this case, for the reason that the court found and set out in the decree that the money due on the note had not been paid to the husband at all; the defendant Kemper having claimed, as his sole defense, that he had paid the money to the husband.

Assignment No. 3, to-wit, that "the court erred in refusing to strike out the testimony of Mollie Withers, the plaintiff, at the close thereof, for the reason that said testimony was incompetent, immaterial and irrelevant, in this: that the plaintiff wholly failed to produce, or to account for the nonproduction of, the note upon which said action was brought,"—is not maintainable, for the reason that the testimony of the plaintiff was not only as to search for the note, but as to circumstances tending to support her averment that the note was not paid at all; and for the further reason that, at the time of the court's refusal to strike out the said testimony of the plaintiff, the testimony of the witnesses for the plaintiff was not all in. The court had no knowledge at the time that material and further evidence might not be introduced by the plaintiff, showing that she had made necessary and diligent search for the instruments by her claimed to be lost. The motion to strike out the testimony, so far as it pertains to the search for the instruments, was not renewed after the evidence for the plaintiff was all in. It would be better practice, in a proper case, to move the court for judgment for want of sufficient evidence, than to move to strike out what evidence was introduced.

Assignment No. 4 refers to the matter of agency, which has already been considered in this opinion.

Assignment No. 11, to the effect that the court erred in allowing a general verdict to be rendered by the jury in the action, on the ground that said action was equitable in its nature, cannot be sustained, as it does not appear that there was anything prejudicial in the jury's action in having unnecessarily rendered a general verdict.

Assignment No. 12 is as follows: "The court erred in overruling defendants' motion to reject the findings and verdict of the jury, and to render judgment for defendants notwithstanding such findings and verdict, for the reason that there was no evidence produced at the trial of said cause to sustain said findings and verdict, or either of them, and that the same are contrary to the evidence;" and assignment No. 13 reads: "The court erred in sustaining the plaintiff's motion to adopt the findings and verdict of the jury, and to order judgment entered in favor of the plaintiff and against the defendants for the amount found in said verdict, for the reason that the evidence conclusively shows that the note and mortgage upon which said action was brought were paid by defendant S. V. Kemper at their maturity, and that at the commencement of this action there was nothing due the plaintiff thereon, and for the further reason that there is no evidence to sustain the said findings and verdict, and that the same are contrary to the evidence." Upon appeal from the judgment alone, the court cannot consider the question whether or not the evidence is of sufficient weight to sustain the decision of the court or the verdict of the jury, as that is a matter which can be considered only upon an appeal from an order granting or denying a motion for a new trial, when duly assigned as one of the grounds of motion for such new trial. There is conflicting evidence upon the material findings, and this is not a case in which there is not any evidence at all tending to sustain the verdict or the decision of the court. Under the provisions of Section 1736 of the Code of Civil Procedure, "any statement used on motion for a new trial may

be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial." The question as to the extent to which the statement will supply the place of a bill of exceptions has not been determined in this state; but, on authority (*Carpenter* v. *Williamson*, 25 Cal. 158) and reason, we believe and hold that the statement can be used in place of a bill of exceptions in the judgment roll only for the purposes for which such bill of exceptions could be used if the appeal from the judgment were brought up on a bill of exceptions contained in the judgment roll. The language of the section referred to is not, in our opinion, intended to enlarge the scope of a bill of exceptions on appeal from a judgment. On appeal from the judgment the court cannot consider any questions raised in the statement on motion for a new trial which it could not consider on a bill of exceptions regularly in the record on appeal from such judgment. It was attempted in this case to use the statement in support of the contention that the evidence does not support the decision of the court finding for the plaintiff. A bill of exceptions can raise only errors of the court in its rulings upon points of law. It is presumed on appeal from a judgment that the court has passed upon all the points raised by the bill of exceptions. Before the court could err in ruling upon the weight of the evidence to support a decision in favor of the plaintiff, it would be necessary for the question to be raised before the court. To hold that on appeal from the judgment such a question could be raised would be to enlarge the number of questions which, under the law in this state, can be considered on appeal from the judgment.

To attack a judgment of the court as not supported by the findings is to raise a question of law. To attack a decision of the court on the ground that there was a total failure of any evidence is to raise a point of law. But, in order to bring questions of the weight of evidence before this court on appeal, there must have been a hearing on motion for a new trial, and an appeal from the order granting or refusing the same. (*Allport* v. *Kelley*, 2 Mont. 343; *Largey* v. *Sedman*, 3 Mont. 472; *Chu-*

masero v. *Vial,* 3 Mont. 376; *Broadwater* v. *Richards,* 4 Mont. 78, 2 Pac. 544, 546; *Princeton Min. Co.* v. *First Nat. Bank,* 7 Mont. 530, 19 Pac. 210; *Lloyd* v. *Sullivan,* 9 Mont. 589, 24 Pac. 217; *Emerson* v. *Eldorado Ditch Co.,* 18 Mont. 247, 44 Pac. 969.)

Assignment No. 14, alleging that the court erred in overruling the defendants' motion for a new trial, of course, cannot be considered on this appeal.

Assignment No. 15 is to the effect that the court erred in rendering judgment in favor of the plaintiff and against the defendants, and has been sufficiently covered in this opinion.

Although this case has been treated by counsel as an equity case, still it has been suggested that, so far as the suit is to recover on the note,—a negotiable instrument,—the suit is in law, as well as to foreclose the mortgage in equity. The question is not before us to determine, and we express no opinion as to any question of the power of the judge, as chancellor, to set aside findings of the jury as to payment or nonpayment of the note, or to adopt the same if they be found by the jury because of materially erroneous and prejudicial instructions. The question is not before us in the case.

We find no errors appearing in the judgment roll, except that in the decree there are certain immaterial findings. The findings of the court as contained in the decree are sufficient to support the judgment; we cannot go outside of them on this appeal, as presented, and we must affirm the judgment of the court below.

The judgment is affirmed.

Affirmed.

Motion for rehearing denied July 18, 1901.

BOUCHER, RESPONDENT, *v.* BARSALOU, APPELLANT.

(No. 1,335.)

(Submitted May 15, 1901. Decided July 8, 1901.)

Unlawful Detainer — Pleading — Inconsistency—Findings—Disposition of Cause—Quieting Title.

1. A complaint to recover land alleged that defendant unlawfully withheld the same, and that the relation of landlord and tenant existed between the parties, which defendant denied, and alleged that plaintiff's grantor held the property as trustee to secure certain indebtedness due him from defendant, and not as owner, of which fact plaintiff had knowledge, and defendant demanded to be decreed the owner of the premises. On plaintiff's motion the equitable defense was tried first, resulting in a finding that plaintiff had no knowledge of the equities existing between defendant and plaintiff's grantor, and that the relation between the latter parties was that of trustee and *cestui que* trust, as alleged by defendant. *Held*, that it was error to refuse to dismiss plaintiff's complaint, since the relation of landlord and tenant, as alleged by the plaintiff, was inconsistent with the facts already found.
2. The action cannot be maintained as a suit to quiet title, since the necessary averment of ownership on the part of plaintiff does not appear, and the case was not tried on that theory.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Frank Boucher against Joseph Barsalou. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Mr. Robert McBride, for Appellant.

Messrs. McHatton & Cotter, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the Court.

This cause is on appeal from the judgment entered in favor of the plaintiff. The plaintiff filed his complaint in unlawful detainer, setting up that the defendant unlawfully withheld form his possession certain real estate, and averring that the relation of landlord and tenant existed between the parties, in

that the defendant had been the tenant of his former landlord, one Ayotte, the latter having conveyed said property for a good and valuable consideration and in fee simple to the plaintiff; and that the plaintiff had given the necessary notice to the defendant to quit said premises. The defendant denied each and every allegation of the complaint, except that he admitted that he was during all the time named in possession, and was, and had been for more than ten years last past, the owner of and entitled to the possession of said property. He unnecessarily, but fully, set out as affirmative matter in his answer an equitable defense, to-wit, that the said Ayotte, at the time that he conveyed the said property to the plaintiff, held the property by deed from him, the said defendant, as security for certain moneys due by defendant to Ayotte; and that the plaintiff, at the time that he took the title from Ayotte, was fully cognizant of the relation existing between Ayotte and defendant. He further alleged that the transfer from Ayotte was fraudulent, and made in collusion with Boucher to defraud him, the defendant; and that all the money, the payment of which was secured by the said deed, had been repaid by defendant to Ayotte; and that he (defendant) was entitled to a reconveyance to him of said property. Defendant demanded, in his answer, that plaintiff take nothing by the action, and that he (defendant) be decreed to be the owner of the premises. The plaintiff, in his reply, denied the affirmative allegations of the answer, and prayed that his right and title to the ownership of said property be quieted.

The cause came on for trial. Upon the motion of the plaintiff, and by order of the court, the equitable defense was tried to the court with a jury, before entering upon the case of plaintiff. The jury made its findings adversely to the defendant as to his equitable defense, and the court adopted the same, and found, among other things, that the plaintiff had no knowledge of the equities existing between the defendant and said Ayotte, and that the relations between defendant and Ayotte were as alleged by the defendant; thus, in effect, declaring that the

relation of landlord and tenant had never existed between Ayotte and the defendant, or between the plaintiff and the defendant. Thereupon the court proceeded to try the original case of the plaintiff on his complaint in unlawful detainer before a jury, and, the first witness having been sworn for the plaintiff, the defendant objected to the introduction of any evidence on the part of the plaintiff, and asked for a judgment of dismissal upon the following grounds: That "this action is brought under the laws of the state of Montana relative to unlawful detainer by a tenant of real property. The allegations in the complaint are: 'That on or about the 1st day of February, 1897, one Sam Ayotte was the owner in fee simple of the premises known and designated as the premises at No. 520 West Granite street, together with the premises in the rear of said number, in the city of Butte, county of Silver Bow, state of Montana, together with the dwelling houses and appurtenances thereto belonging. That on said last mentioned date, and for some time prior thereto, the said defendant, Joseph Barsalou, was in possession of said premises as the tenant of said Sam Ayotte, under a monthly tenancy of $10 per month, payable monthly in advance. That on the 20th day of February, 1897, the said Sam Ayotte conveyed to the plaintiff herein the premises above described, and said plaintiff, as the grantee and successor in interest of said Sam Ayotte, by his agent, notified the defendant of his having bought and purchased the said above described real property from said Sam Ayotte; and the defendant herein was notified by said agent of plaintiff that his rent thereafter and from that time would be $12.50 per month, payable monthly in advance. That said defendant, after said notification as aforesaid by the agent of said plaintiff, continued and remained in possession of the said premises as the tenant of said plaintiff, holding over under the terms of the verbal lease and agreement made by him with his former landlord, Sam Ayotte, the grantor of the plaintiff herein, and said defendant is now in possession of the said premises, and still continues to hold and occupy the same. That, pursuant to the terms of said verbal lease and

agreement made by this defendant with said Sam Ayotte, there became and was due to the plaintiff, as the grantee and successor in interest of said Sam Ayotte, and as the landlord of this defendant, as rent for the above described and leased house and premises, on the 20th day of February, 1897, the sum of $12.50.'

"The only claim that the plaintiff in this case makes to be considered the landlord of this defendant is the claim that there was a verbal lease between Samuel Ayotte and Joseph Barsalou, whereby Barsalou had agreed to pay rent to the said Ayotte, and Mr. Boucher, as the successor in interest of Ayotte, claims to be the landlord of said Barsalou. He does not claim to be the landlord by any agreement between himself and Barsalou.

"Now, in this case the court has already found, upon the equitable issues, that the relation existing between Samuel Ayotte and Joseph Barsalou at all times mentioned in the complaint was the relation of trustee and *cestui que* trust, and not the relation of landlord and tenant.

"Now, the equitable title belonging to Barsalou and the naked legal title to Ayotte, at any time prior to the time of the alleged conveyance of the property by Ayotte to Boucher, Mr. Barsalou would have the right to demand and compel a reconveyance of the property to him. Therefore the relation of landlord and tenant is absolutely inconsistent with the facts already found, and therefore we object to any testimony under the pleadings." Whereupon the court ruled as follows: "My view of this matter is in accordance with the contention of counsel for defendant, and that to proceed with the trial of this case, in view of the findings of the court, would be improper and inconsistent; and the objection will be sustained, and the jury are discharged." To this ruling of the court plaintiff excepted. Thereupon the court caused to be entered upon the court's record the following order, to-wit: "And the defendant objected to the introduction of any and all testimony on the part of plaintiff, and also moved the court to dismiss the action, and for judgment for his costs. Said objection and said motion are argued by

counsel, and said objection to the introduction of any testimony is by the court sustained, to which ruling counsel for plaintiff duly excepts, and the jury are discharged from further service." Thereafter, and on the next day, the court made the following order: "This day the motion of defendant that the action be dismissed and for judgment for costs, heretofore argued, is by the court overruled; to which ruling counsel for defendant duly excepts." On the same day the court signed and there is filed a judgment in favor of the plaintiff and against the defendant for the ownership of the property described in plaintiff's complaint, and for plaintiff's costs of suit.

The proceedings, as presented on the record, are anomalous, and without precedent, so far as we know. It is apparent from the argument used by the defendant in his objection to the introduction of evidence, and from the remarks of the court and his ruling on the objection, that up to the time of the court's order sustaining the said objection, the case had not been tried upon the theory that it was a suit to quiet title. Nowhere in the pleadings of the plaintiff is there any allegation of ownership on the part of the plaintiff. The principal point saved in the exceptions and treated by the several counsel in their briefs is error of the court in entering the said judgment for plaintiff. When the court held that by laches on the part of the defendant he could not maintain his equitable defense, and, in effect, found that the relation of landlord and tenant did not exist between the plaintiff and the defendant, and declined to allow any evidence to be introduced on the part of the plaintiff in support of his complaint, the duty of the court was to dismiss the action at the cost of the plaintiff.

Without passing upon the point contended for by plaintiff's counsel, to-wit, that a suit to quiet title can be maintained, tried and adjudicated on the issues raised in the equitable defense to a suit in unlawful detainer, suffice it to say that the necessary averment of ownership on the part of the plaintiff does not appear in the pleadings; and, further, that the case was not tried upon the theory that it was in anywise a cause to quiet title

in the plaintiff. As we have said before, the proceedings are anomalous, and the action of the court, under the circumstances as set forth in this opinion, was error.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

Rehearing denied July 31, 1901.

FERRELL, APPELLANT, *v.* EVANS ET AL., RESPONDENTS.

(No. 1,330.)

(Submitted April 19, 1901. Decided July 15, 1901.)

Building and Loan Associations—Expiration of Charter—Unmatured Stock—Borrower—Application of Bonus—Credit for Stock—Receiver.

1. Where, the charter of a building and loan company having expired, the directors, as trustees in winding up its affairs, collected from a borrower interest and dues on shares of stock, on foreclosure of his mortgage the sums so collected should be credited on the mortgage debt.
2. Plaintiff, a stockholder in a building and loan association, borrowed therefrom, giving a bonus. Before the stock matured the charter expired. *Held*, that plaintiff should be credited with so much of the bonus as was unearned, computed by dividing the amount of bonus by the number of months which would be required to mature the stock, and multiplying the quotient by the number of months still to elapse before such maturity.
3. When the charter of a building and loan association expired before its stock matured, a borrower should be credited with the accrued value of his shares of stock and the unearned portion of his bonus, computed to the time the charter expired, less his share of expenses of administering the affairs of the association.
4. Under Civil Code, Sec. 561, constituting the directors of a corporation dissolved for any reason trustees to wind up its affairs, when the directors of a building and loan association, whose charter has expired, are acting as such trustees, a receiver should not be appointed unless it appears that the party complaining has been, or is about to be, injured by unwarranted procedure on the part of such trustees.

Appeal from District Court, Missoula County; Frank H. Woody, Judge.

ACTION by Van R. Ferrell against J. M. Evans and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Reversed.

STATEMENT OF THE CASE.

The plaintiff brought this action against the defendants, as trustees of the Missoula Building & Loan Association, a corporation, to obtain a judgment requiring them to cancel upon the records of Missoula county as fully paid three several mortgages executed to the corporation by one Cain B. Mahoney, plaintiff's grantor. Judgment is also demanded for a balance which is alleged to have been paid by plaintiff and Mahoney in excess of the amounts secured by the mortgages. As incidental relief, the court is asked to appoint a receiver to take charge of the assets of the corporation and wind up its business. The answer of defendants denies the material allegations contained in the complaint, and then, by way of separate counterclaims, alleges a breach of the conditions of each of the mortgages, and demands a decree of foreclosure to enforce the payment of the respective amounts secured by them.

The facts, as they appear from the evidence, are: On May 6, 1886, the Missoula Building & Loan Association was incorporated under the provisions of an act of the legislative assembly of the territory of Montana approved March 7, 1883, for the purpose of enabling its shareholders to erect buildings and improve land. The corporation conducted its business successfully and profitably until May 6, 1896, the date on which the ten-years limitation fixed in its charter expired, and the corporation was dissolved, whereupon the defendants, its then acting directors, under the authority vested in them by law, assumed control of all the property and assets belonging to it, and proceeded to wind up its affairs. At various times after its organization the corporation had issued five different series of shares of the par value of $200 each, designated as Series A, B, C, D and E. Of these the first two series had matured prior to

May 6, 1896, and were then in process of redemption. The remaining three series had been issued on June 4, 1888, November 3, 1890, and June 8, 1895, respectively; and it was estimated by the directors at the time they assumed control, the estimate being based upon the time required to mature Series A and B, that each of these series would have matured in 101 months from the dates of issuance, or in 6 and 35 months, respectively, after the date of dissolution. Upon the assumption of their duties as trustees, the directors were of the opinion that they were empowered to continue the collection of dues, fines, premiums and interest until the maturity of the outstanding shares, and proceeded to do so. Subsequently, however, they changed their views, and on August 22, 1896, issued a circular to the shareholders, in which they set forth in detail the condition of affairs, and announced that thereafter no dues or fines would be collected from nonborrowing shareholders, and that upon application all payments made by such shareholders after May 6, 1896, would be refunded, but that borrowing shareholders would be required to keep up their monthly payments as theretofore until the maturity of their shares. It was also stated that on May 6, 1896, the shares of Series C had an earned value of $182.82, of Series D, $113.42, and of Series E, $23.62, and that, as fast as the assets could be turned into money, payments would be made to nonborrowing shareholders until they had received full earned value of their shares fixed at these amounts. Thereafter they proceeded upon this idea of the extent of their powers, collecting dues and fines from the borrowing shareholders, until their regular monthly meeting in December, 1896, when, by resolution, they declared all shares of Series C fully matured, and thereupon executed releases of all mortgages given by the borrowing shareholders of this series. On June 4, 1888, Mahoney purchased of the association eight shares of Series C, and on November 3, 1890, four shares of Series D. On the first Monday in September, 1888, the association having money in its treasury, under the provisions of its by-laws offered to loan $1,200 thereof to the share-

holder who would pay the highest premium thereon. Mahoney having offered 30½ per cent. premium, became the borrower, and, in accordance with the requirements of the by-laws of the association, executed a bond to the association under the terms of which he agreed to repay the amount so borrowed on or before ten years from date, unless the association should sooner terminate, and then upon such termination, with interest at the rate of 9 per cent. per annum payable monthly on the first day of each and every month thereafter. He also agreed to keep up the monthly dues of one dollar a share upon six of the shares of Series C belonging to him until he had fully repaid the said sum of $1,200, and to assign these six shares to the company as security for the repayment of the loan. It was further provided in the bond that the principal sum mentioned therein, with interest, should become immediately due and payable upon default in payment of interest, or if the taxes due on the property or the premium upon not less than $900 of insurance thereon should be due and unpaid for six months, or in case the shares of stock should at any time be sold for the nonpayment of dues or fines, or become forfeited to the association for reason. At the same time, as further security for the repayment of the sum borrowed, Mahoney executed to the association a mortgage upon the real estate in controversy. This instrument contained the same conditions as those in the bond, and further provided that all insurance stipulated for should be effected for the benefit of the association, and that, in case of default in this particular or in the prompt payment of taxes, the association might advance such sum or sums as might be necessary to meet these charges, and that they should, upon foreclosure, be deemed secured by the mortgage, and bear the same rate of interest as the principal sum secured thereby. Subsequently, and on July 3, 1889, a similar transaction took place between Mahoney and the association, by which, upon paying a premium of 21 per cent., Mahoney obtained a loan of $400, and to secure the same assigned to the association the remaining two shares of Series C, and executed his bond, with a second

mortgage, upon the property on the same terms and conditions as those contained in the first mortgage. Again, on May 2, 1892, by a similar transaction, Mahoney secured a third loan of $800 on his four shares of Series D, but at a premium of 29 per cent., and thereupon executed to the association his third bond and mortgage, with terms and conditions identical with those upon which the other loans had been obtained. In case of each loan the premium was paid in advance, the association deducting the amount from the face of the loan; the bond and mortgage being executed to the full amount for which each bid was made. Mahoney made all payments of interest, dues and fines when they were assessed under the by-laws of the association until November 6, 1893, when the plaintiff purchased the mortgaged property from him, assumed the payment of the mortgages, and became substituted to all his rights and liabilities as a borrowing shareholder in the association. After this date, and until May 6, 1896, the plaintiff met all the obligations assumed by him as a shareholder, kept paid up the monthly installments of interest, and observed all the conditions of the several mortgages, but after that date failed and refused to make any other payments of dues or interest, except that on August 1, 1896, he paid the dues for June, July and August on the four shares of Series D, and the interest due for those months upon the loan secured upon these shares, amounting together to the sum of $30. He also failed to keep the property insured, insisting that the payments already made had more than discharged the various loans, and that he was entitled to have the mortgages released. On November 6, 1897, the trustees had the property insured at a cost of $25.60.

Upon these facts the district court found that the association was dissolved, and that the directors had properly assumed control of its affairs as trustees of the shareholders and creditors, and that the plaintiff was not entitled to have a receiver appointed; that the trustees had no authority to collect fines and dues upon the unmatured shares, whether held by a borrower or not, but that their functions and powers were limited to the

doing of such acts only as were necessary to collect and distribute the assets; that the fines and monthly dues paid by the shareholders were not to be regarded as credits upon loans, but belonged to all the shareholders; that the plaintiff was not entitled to a credit for the full amount of the premiums paid upon his loans, but for such part thereof only as had not been earned, this amount to be determined by dividing the whole premium paid by the number of months required to mature the shares upon which the particular loan was made, and multiplying the quotient by the number of months still to elapse before maturity; that the monthly payments of interest were not *ipso facto* credits upon the mortgage indebtedness, but should be so treated, the payment on each loan to be applied to it under the rule of partial payments; and that the unearned premium was to be deducted in each instance from the loan upon which it was paid as of the date at which it was made.

The cause was then submitted to a referee to ascertain the difference between the parties under these findings as follows: (1) to ascertain the amount of unearned premium on each loan, and deduct the same from the amount of the loan at the date at which it was obtained; (2) to compute the interest on the balance at 9 per cent. per annum from the date at which the loan was made; (3) to find the amount paid as interest on each loan, and give plaintiff credit for the same on the principle of partial payments, and thus find the difference; and (4) if there should thus be found any sum still due defendants, then to add to such amount the $25.60 paid by defendants for insurance, with interest at 9 per cent. per annum from November 6, 1897, the date of payment.

The referee found and reported a balance due defendants, including the sum paid for insurance, with interest thereon, of $2,753, and a judgment of foreclosure was entered in their favor directing a sale of the property. Plaintiff has appealed from the judgment and an order denying a new trial.

Mr. Marcus L. Crouch and *Mr. Gust Moser,* for Appellant.

Mr. George B. Wilds and *Mr. E. E. Hershey,* for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the Court.

Many errors are alleged as grounds for a reversal of the action of the district court, but of these we shall notice only three.

1. In the directions given to the referee touching the credits to be allowed plaintiff in ascertaining the balance due, no account was taken of the sum of $30 paid as interest and dues for June, July and August on the four shares of Series D. This amount, with interest from the date of payment, should have been allowed as a credit.

2. Plaintiff insists that he should have been allowed as credits upon his loans the whole amount of the premiums paid by him as of the respective dates of payment. The theory of his argument is that the consideration or inducement for paying these large premiums was the mode of payment, being in small sums monthly, and his participation in profits resulting from premiums, dues and fines from time to time, and other sources of income; and that as the association allowed itself to become dissolved by limitation, this consideration has failed. He insists, also, that the relation between himself and the association should be declared to be that of debtor and creditor simply, and that the settlement should be made on that basis, he being allowed credit for all payments made on the principle of partial payments. Taking the contracts as they are stated in the bonds and mortgages according to their terms, they provide for a repayment of the sums advanced absolutely at the end of ten years, or upon the expiration of the charter limit, without reference to the maturity of the shares. They contain no stipulation that upon the maturity of the shares they should be finally surrendered in full payment of the loans. Under the by-laws of the association, however, this stipulation is to be read into them, and they are to be construed accordingly. The shares were bought, and the loans or advancements were made,

with the intention that this should be the result. Indeed, no other claim is made by the trustees. They assume the position, however, that the possible dissolution of the association before maturity of all shares was a matter within the contemplation of the plaintiff as well as of the association, and that, having secured the advancements under such circumstances, it would be inequitable to allow him a credit for the premiums, or any part of them, thus depriving the nonborrowing shareholders of a part of the value of their shares as ascertained at the date of dissolution. They insist also that under the circumstances of this case, other borrowing shareholders having fully matured their stock without taking credit for any portion of the premium paid, the plaintiff should not be allowed a credit for his. We do not think either of these positions correct. The plan adopted by the trustees to mature the shares of the borrowing members was entirely unauthorized. As there were no outside creditors, the only power possessed by them was to collect up the assets, and distribute them *pro rata* among all the shareholders. Apart from the payment made by the plaintiff in August, 1896, which has already been disposed of, we shall, therefore, disregard entirely what has been done by the trustees since May, 1896, and ascertain from the conditions then existing what the rights of the parties are. The weight of authority is, perhaps, in favor of plaintiff's position that he should be credited with the full amount of the premiums paid as of the date of each loan. This coincides with the view stated by Mr. Endlich in section 531 of his work on Building Associations. It is not controverted by plaintiff, however, that the ascertained value of unmatured shares of Series C and D, on May 6, 1896, was correctly stated in the circular of August 22. These values were obtained by apportioning all premiums, interest, dues and fines paid up to that time, and also funds arising from forfeitures. The premiums had been paid with full knowledge that the association would be dissolved on that date, without reference to the maturity of the shares. It is not claimed that the holders of these shares would not, under the value thus ascer-

tained, receive all that they had paid into the association, dollar for dollar, and a profit besides. In fact, from the condition of affairs as shown in the record, the shares were worth more than had been paid upon them, with accumulated interest. The association was, therefore, not insolvent. This condition exists only where, in the course of the business, the principal of the shareholders has become so impaired as to fall below the level of the amount paid in. The premium paid by plaintiff, as well as by the other advanced members, entered into and made a part of the value of the shares. This adjustment gives to the unadvanced members somewhat the advantage, and to this extent is inequitable. At the same time, to allow plaintiff credit for the whole of the amounts paid would give him a much greater advantage over them. The question how to dispose of it presents great difficulty, but the plan adopted by the court below, by which he was given credit for the unearned portion, seems, under all the circumstances, to be the most equitable; for it must be remembered that the obligations resting upon the members are mutual, and that all are parties to the contract of advancement or loan. Though, upon the dissolution, the contract was broken down, yet in adjusting the rights of the shareholders as among themselves it should be enforced as near as may be with the view of allowing each to receive nothing more than his associate. The consideration for which the premium was paid has failed in part, but only in part. The statutes in some of the states governing these associations provide that upon voluntary repayment of a loan there must be an equitable apportionment of the premium, and this principle, which produces a fair result, has been recognized and applied to cases where the association has become insolvent, and has had its affairs administered by a court of equity. (*Towle* v. *Am. Bldg. Loan & Inv. Society* (C. C.), 61 Fed. 446.) Though the act authorizing the association in question here contained no provision on this subject, subsequent acts of both the territorial and state legislatures have recognized and provided for its application to voluntary payments. Under the circum-

stances of this case, we think its application just and equitable.

The district court held that the only credits to which the plaintiff was entitled were the interest payments and the unearned portion of the premiums, and that he must pay the balance due upon the bonds and mortgages. No provision was made in the decree allowing him a distributive share in the assets upon final distribution. We think it was its duty to ascertain what the accrued value of the shares of each class was, and to allow plaintiff a credit also for these amounts upon the respective loans, without interest, after deducting from the value of the stock a sufficient amount to pay plaintiff's proportionate share of the reasonable expenses of administration of affairs by the trustees. There can be no just reason assigned, under the circumstances, why the plaintiff should be compelled to pay the full amount of his loan as found by the trial court, and then be presently reimbursed by the trustees. The method of settlement thus indicated not only secures to plaintiff all the rights to which he is entitled, but it also does no wrong to other shareholders. The settlement should, therefore, have been made as follows: Charge the plaintiff with the amounts of the loans, without interest, including the earned portion of the premiums as found by the district court; credit him with the ascertained value of his shares on May 6, 1896, less his share of expenses of administration; then charge interest from that date until the date of judgment upon any balance found due. Plaintiff should also be credited, as hereinbefore indicated, with the amount of the payment made in August, 1896, and in like manner charged with the insurance premium paid by the trustees in November, 1897.

3. Plaintiff contends that a receiver should have been appointed, because the evidence demonstrates that the association was insolvent at the date of its dissolution, and that at the time this suit was brought the trustees were proceeding to continue the business by collecting dues, fines and interest from the borrowing shareholders, instead of limiting themselves to collecting and distributing the assets; thus casting an unequal bur-

den upon the borrowing shareholders. Section 561 of the Civil Code constitutes the directors of a corporation dissolved for any reason trustees for the creditors and shareholders, with full power to wind up its affairs, unless some other person be appointed for that purpose. No exception is made in case of insolvency. The intention of the legislature seems to have been to provide the most inexpensive and expeditious way for the administration of the affairs of a defunct corporation by confiding them to the hands of those who are best acquainted with them, and have a direct personal interest in preserving and appropriating the assets to their legitimate purposes, subject to an accounting or removal by a court of equity at the instance of a shareholder or creditor whose rights are jeopardized or betrayed. (*Havemeyer* v. *Superior Court,* 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.) In no case, however, will a court resort to a removal of a statutory receiver, and appoint one in his stead, until it is made to appear that the person complaining has been, or is about to be, injured by an unwarranted procedure on his part. In this case, as we have seen, the association was not insolvent. The principal of the contributing shareholders was not impaired in any way at the time of the dissolution, and it is not claimed that the assets have been mismanaged, or in any way misappropriated by the trustees. True, as has already been stated, their action in attempting to mature the shares of the borrowing shareholders was and is unauthorized; but their course in this particular has not resulted in loss, nor has it in any way injured plaintiff. Indeed, the holders of shares of Series C who paid their interest and dues after the dissolution, thus making a conventional arrangement with the trustees, received all the advantages they would have received if there had been no dissolution. Instead of ascertaining the balance due from himself, and tendering it to the trustees, thus securing his release, or, which would have been better, demanding an accounting of them, and thus speeding them in the administration of their trust, he took advantage of the indulgence extended to him by them,

and, when they refused to release him from his just obligations to the other shareholders, he sought to further delay and confuse matters and incur expense by insisting that they should be declared unworthy of confidence, and a receiver be appointed in their stead. Their acts, though unauthorized, have not injured him. He therefore has no sufficient ground upon which to urge the court to discredit them. The appointment of a receiver was properly refused.

Let the judgment and order be reversed, and the cause be remanded, with directions to proceed in accordance with the views herein expressed.

Reversed and remanded.

MR. JUSTICE PIGOTT: I concur.

MR. JUSTICE MILBURN: I concur in the judgment of reversal, and with the conclusions and reasoning of the Chief Justice as to all matters except as to the premiums. There seems to be no contention between the parties as to the district court's finding that the plaintiff was entitled to a credit for unearned premiums or "bonus," but as to its correctness I am not sure. If the company had failed to do its part of the contract, or if it had agreed to let the plaintiff pay up before the end of the life of the concern, then we should have a different case from the one at bar; but when the borrower gives a bonus for the use of the money, to be paid back in installments during a term limited, as he contemplates, by the life of the association, I cannot see why, at the end of such life, he should have a special credit upon his mortgage debt for any alleged unearned part of the bonus. In the auction sale of the money to the borrower, he, knowing the term of the company's life, made his bid proportionately large or small. I do not see how he can get any credit for any alleged unearned part, except indirectly, and so far as all the bonus went to swell the value of his stock with all the other stock, the value of the stock going to wipe out his mortgages.

McDONALD, RESPONDENT, *v.* AMERICAN NATIONAL BANK, APPELLANT.

COONEY, RESPONDENT, *v.* AMERICAN NATIONAL BANK, APPELLANT.

(No. 1,324.)

(Submitted April 17, 1901. Decided July 15, 1901.)

Banks and Banking—Special Deposit—Defendant's Liability—Promise for Benefit of Third Person—Enforcement—Voluntary Trust—Executory Contract.

1. Plaintiffs agreed to sell a mine to M., and the deeds were placed in *escrow* in the defendant bank until payment of $47,000 as a balance of the purchase price. M. sold the mine to Scottish purchasers, and the seventh paragraph of the contract provided that £20,000 should be deposited with the defendant bank to pay plaintiffs the balance of the purchase price in full, and other charges against the mine, and that amount and a copy of the contract were forwarded to the bank, and the cashier's attention was called to the seventh paragraph. Plaintiffs, without knowledge of such contract, agreed to deliver the deeds on receipt of $22,000 in cash out of the first payment by the foreign purchasers, and to accept M.'s notes for the balance until the second payment. Defendant, without informing plaintiffs of the provisions of the contract between M. and the foreign purchasers, paid plaintiffs $22,000. The foreign purchasers never made any further payments. *Held,* that plaintiffs were not entitled to recover the balance of the purchase price from defendant as money had and received.
2. Defendant's acceptance of the funds did not constitute an implied promise to the foreign purchasers for the benefit of plaintiffs that the defendant would pay the plaintiffs the balance of the purchase price in full.
3. The deposit did not create a voluntary trust in favor of the plaintiffs as beneficiaries, under Civil Code, Sec. 2951, defining a voluntary trust as an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another, and section 2956, declaring that a voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor intending with reasonable certainty and intention on the part of the trustor to create a trust.
4. Under Civil Code, Sec. 2103, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescinded, plaintiffs were not entitled to enforce the contract for the payment of the balance of the purchase price as a contract made for their benefit, since section 2103 does not apply to executory contracts without consideration.

Appeal from District Court, Lewis and Clarke County; M. H. Parker, Judge.

Actions by Angus McDonald and by Tom D. Cooney against the American National Bank. From judgments in favor of plaintiffs, defendant appeals. Reversed.

Messrs. Carpenter & Carpenter and *Mr. H. G. McIntire,* for Appellant.

The draft for $96,800 was not forwarded to the bank as trustee for plaintiffs, or either of them, nor for the benefit of them, or either of them. McDonald consented to receive $15,000 of that money and Miller's note for $15,000 as payment. Cooney consented to receive $7,000 of that money and Miller's note for $10,000 as payment. The beneficiaries could consent to the new arrangement. (*Bank* v. *Lobdell,* 78 Ill. App. 602.) All of the money received by the bank was paid out with the approval of plaintiffs. If plaintiffs have suffered damage, they may not recover in an action for money had and received. "In order to maintain the action, there must be money in the defendant's hands to which the plaintiff is immediately entitled." The money must actually have been received by the defendant. (4 Wait, Act. & Def. 470; *Beardsley* v. *Root,* 11 Johns. 466, 6 Am. Dec. 386; *Clark* v. *Sherman,* 5 Wash. 631, 32 Pac. 771; *Distler* v. *Dabney,* 3 Wash. 200, 28 Pac. 335; *Thill* v. *Hoyt,* (Sup.) 56 N. Y. Supp. 78; 2 Enc. Pl. & Prac. p. 1021; *Southwick* v. *Bank,* 84 N. Y. 420.) If plaintiffs surrendered any rights through misrepresentation, their remedy is through an action for damages for the deceit. The orders and consents by plaintiffs were admissible in evidence for the defense. (*Edson* v. *Weston,* 7 Cow. 281; *Wilt* v. *Ogden,* 13 Johns. 56; 18 Am. & Eng. Enc. Law, p. 540, note 9; Abb. Tr. Ev. p. 281; Civil Code, Sec. 4606.) Plaintiffs may not possibly recover against defendant without first surrendering or canceling the notes. (6 Wait, Act. & Def. p. 563; *Holmes* v. *De Camp,* 1 Johns. 34, 3 Am. Dec. 293; *Gifford* v. *Carvil,* 29 Cal. 595; *Maloy* v. *Berkin,* 11 Mont. 144-146, 27 Pac. 442.) An indefinite agreement as to amounts will not support *assumpsit.* (*Harvey* v. *Condensed Milk Co.,* 92 Me. 115, 42 Atl. 342.) The amount

that was owing and to be paid to plaintiffs from the $96,800 was designated by Miller and plaintiffs. The defendant could not establish that amount, but whatever was agreed upon between plaintiffs and Miller would have to be satisfactory to and binding upon defendant. If plaintiffs chose to enter into a new contract with Miller for a smaller purchase price, that price would be controlling upon the bank; and, if the bank paid plaintiffs a larger amount than thus agreed upon, it would be liable to Miller for the excess.

Again, under the pleading in this case, in order to recover, it was necessary for the plaintiffs to show: (1) A receiving by the defendant bank of money to the use of plaintiffs, respectively; (2) a demand by the plaintiffs, respectively, for the same, and a refusal or neglect on the part of the bank to comply with such demand. Proof of demand is essential in this class of actions. (Civil Code, Sec. 2451.) There was no demand.

From the seventh clause of the agreement it appears: (1) That there had been an agreement for at least one cash payment of £5,000 before the cash payment of £5,000 mentioned in said seventh clause was to be made. (2) That the cash payment of £5,000 and the loan of £15,000 were not to be made to Miller by handing the money directly to him, but part or the whole thereof was to be applied through the American National Bank in such a way as to aid Miller in acquiring and transferring, and the company in obtaining, a good title to the property, and be equivalent to payment to him, and only the surplus was to be paid to Miller. (3) That evidently Nimmo and Mitchell supposed some attachments, liens, incumbrances, claims and demands existed against the property which Miller had contracted to purchase, and also that at least part of the purchase price had not been paid by Miller. (4) That the plain intention of the parties, as derived from the language of the seventh clause, was that the company should acquire a good title to the property to be conveyed to it by Miller, and that Miller should furnish a good title by the discharge of all liens and incumbrances that might injuriously affect the property, whether they

were attachment liens, mechanics' liens or vendors' liens, or all combined. (5) That it evidently occurred to Nimmo and Mitchell that, if the £20,000 were handed directly to Miller, he might not arrange matters so as to convey a satisfactory title to the company, and the acquisition of the mines by the company might fail. (6) That the money, therefore, with consent of Miller, was to be sent to the American National Bank, to secure the discharge of such liens, and make such payments of purchase money as would enable Miller to convey a satisfactory title to the company; the number and amount of the claims against the property being unknown to Nimmo and Mitchell. (7) That the purpose of paying through the bank any money due as purchase price was not to benefit McDonald and Cooney, but to protect the company, and, if McDonald and Cooney were thereby benefited, the benefit to them was only incidental. Nimmo and Mitchell owed neither a debt nor a duty to McDonald or Cooney, and there is not the slightest indication of an intention to create a trust or make a contract for the benefit of McDonald or Cooney. (8) That the bank was in no respect a trustee for McDonald or Cooney. If a trustee at all, it was for Nimmo and Mitchell or the company; Miller consenting to the arrangement, so that the proposed transfer of the mines to the company could be carried into effect. (9) That the bank was simply an agent for the company to watch the transfer of title. Its duty was that of an ordinary agent of the company, to do what the company itself might have done with Miller's consent to secure a good title.

The company had no concern for Miller's debts, or his creditors. It owed no duty or obligation to plaintiffs, and sought only its own protection. To Miller it was a matter of indifference whether the money paid certain claims or went to him. Only Miller, or the company, or Nimmo and Mitchell could complain of any breach of contract by the bank. Under the Codes of Montana, and the authorities to which we shall call the attention of the court, that agreement was not entered into for the benefit of plaintiffs, and was clearly not admissible in

evidence. In the court below counsel for plaintiffs contended that the contract made the defendant the trustee of an express trust for the benefit of plaintiffs, and that the contract could be enforced by plaintiffs, because it was made expressly for their benefit; and cited the following sections of the Civil Code to support their contention: Sections 2951, 2953, 2956, 3001, 2103. It will plainly appear that those sections do not tend in any way to support the contentions of the respondent. Section 3000 of the Civil Code is as follows: "Sec. 3000. The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators and guardians, as such." It is doubtful whether the chapter containing that section was intended to apply to any trust property except real estate. The only section of out statutes authorizing the creation of express trusts is Section 1314 of the Civil Code. That section is substantially section 55 of an article of uses and trusts, at page 728, 1 Rev. St. N: Y. That section appeared in Field's proposed New York Civil Code, and came to Montana from California. In New York, except as used in the Code of Civil Procedure, the term "express trust" signified only a trust relating to real estate. (*Considerant* v. *Brisbane,* 22 N. Y. 395; *Brown* v. *Cherry,* 56 Barb. 644.) It seems to have been used with that meaning in Section 3000 of the Civil Code of Montana. The language of the chapter is all applicable to trusts relating to real estate, and but little applicable to the simple disbursement of money by an agent. That the signification of "express trust," as used in the Civil Code, is as above stated, appears from Section 570 of the Code of Civil Procedure. That section, as originally enacted in New York, did not contain the words, "a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section." (Voorhies' New York Code, Sec. 113.) Those words were added to the section in New York on the ground that "express trusts"

were only trusts relating to real estate; and the section as amended has been adopted in Montana, together with substantially the section which declares what "express trusts" may be created, showing that in Montana "express trusts," as used in the Civil Code, were intended to apply only to real estate. If an express trust, in the broadest common-law sense of the term, was created by Exhibit A, it was not for the benefit of McDonald or Cooney. From the reading of the agreement it has already appeared that the arrangement as to the discharge of liens and unpaid purchase price was simply for the benefit and protection of the company, and provided a scheme for the purpose of such protection. Section 3001 of the Civil Code is simply a partial repetition of said Section 2103, and to give it any application to this case it must be established that an express trust has been created for the benefit of another than the trustor, and that the title to the trust property has been vested in the trustee. This Section 3001 states only one of the elements of a trust for the benefit of another than the trustor, and means that there shall be no such trust without an agreement to that effect between the trustor and trustee. There was no trust created for the benefit of plaintiffs in accordance with the chapter of the Civil Code on trusts. There was no such trust created by Sections 2956 and 2957 of said Code, because, by the agreement itself, as we have already seen, there is shown no intention to create such a trust.

This contract was not an agreement for the benefit of plaintiffs, within the meaning of Section 2103 of the Civil Code. That section has no application to the agreement offered in evidence, as we have seen that the agreement was not made expressly for the benefit of plaintiffs, or with any purpose for their benefit. But, to show the utter irrelevancy of this agreement as testimony to support the causes of action alleged in the complaints, it is proper to call the attention of this court to numerous decisions of other courts upon analogous questions and identical legal principles. The English rule is that, where one of two persons, for a valuable consideration, agrees to pay the

other's debt to a third person, an action by such third person against the promisor will not lie. In several of the United States such an action will lie. The leading American case to that effect, though not the first to break away from the English rule, is that of *Lawrence* v. *Fox,* 20 N. Y. 268. In that case it was held that "an action lies on a promise made by the defendant upon valid consideration to a third party for the benefit of plaintiff, although the plaintiff was not privy to the consideration." This case was decided on the authority of an early English case not followed in England, and of certain Massachusetts cases, since overruled in that state, and, while not overruled in New York, the courts of New York have repeatedly announced that the principle of *Lawrence* v. *Fox* "should be limited to cases having the same essential facts." (*Lorilard* v. *Clyde,* 122 N. Y. 503, 25 N. E. 917, 10 L. R. A. 113; 7 Am. & Eng. Enc. Law (2d Ed.), pp. 105-107.) The New York cases since *Lawrence* v. *Fox, supra,* and *Burr* v. *Beers,* 24 N. Y. 178, 80 Am. Dec. 327, all hold that, to give a right of action to the so-called "beneficiary" against the promisor, there must have been a duty or obligation from the promisee to the so-called "beneficiary" upon which a legal right could be based, and the contract must have been entered into for the express purpose of conferring a benefit upon him, and that it is not sufficient that a benefit might incidentally accrue to him.

Whether the arrangement be called a contract or a trust is immaterial, as every accepted trust is a contract, and a majority of contracts are trusts in the sense that "personal confidence is reposed in, and voluntarily accepted for the benefit of, another." Whenever an action at law can be maintained, it is because there is a legal right in the plaintiff. The enforcement of a pure trust should be made in equity, and not at law. (*Garnsey* v. *Rogers,* 47 N. Y. 233, 7 Am. Rep. 440; *Vrooman* v. *Turner,* 69 N. Y. 283-285, 25 Am. Rep. 195; *King* v. *Whitely,* 10 Paige, 465; *Hoffman* v. *Schwaebe,* 33 Barb. 194; *Townsend* v. *Rackham,* 143 N. Y. 522, 38 N. E. 731; *Durnherr* v. *Rau,* 135 N. Y. 222, 32 N. E. 49; *Merrill* v. *Green,* 55 N.

Y. 270; *Simson* v. *Brown,* 68 N. Y. 355; *Railroad Co.* v. *Curtis,* 80 N. Y. 222; *Lehman* v. *Musgrave* (Sup.), 48 N. Y. Supp. 499.) The New York rule that "incidental benefit is not sufficient to give a right of action, but there must be a direct object to benefit a person in order to entitle him to sue, and a legal duty owing to him by the promisee," has been followed in California in the construction of the statutes under which plaintiffs claim. (*Chung Kee* v. *Davidson,* 73 Cal. 525, 15 Pac. 100; *Buckley* v. *Gray,* 110 Cal. 346, 42 Pac. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88; *Bank* v. *Thornton,* 112 Cal. 259, 44 Pac. 466.) The same rule is recognized and applied in other states. (*Greenwood* v. *Sheldon,* 31 Minn. 254, 17 N. W. 478; *Ferris* v. *Water Co.,* 16 Nev. 44, 40 Am. Rep. 485; *Burton* v. *Larkin,* 36 Kan. 246, 59 Am. St. Rep. 541, 13 Pac. 398; *Lumber Co.* v. *Miller,* 28 Ore. 565, 52 Am. St. Rep. 807, 43 Pac. 659; *Montgomery* v. *Spencer,* 15 Utah 495, 50 Pac. 625; *Wright* v. *Terry,* 23 Fla. 160, 2 South. 6; *Crandall* v. *Payne,* 154 Ill. 627, 39 N. E. 601; *Jefferson* v. *Asch,* 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618; *Linneman* v. *Moross' Estate,* 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; *Howsmon* v. *Water Co.,* 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Parlin* v. *Brandenburg,* 2 N. D. 473, 52 N. W. 405; *Parker* v. *Jeffery,* 26 Or. 186, 37 Pac. 712; *Washburn* v. *Investment Co.,* 26 Or. 436, 36 Pac. 533, 38 Pac. 620; *Wilbur* v. *Wilbur,* 17 R. I. 295, 21 Atl. 497; *Meech* v. *Ensign,* 49 Conn. 191, 44 Am. Rep. 225; *Harvey* v. *Condensed Milk Co.,* 92 Me. 115, 42 Atl. 342; *Mellen* v. *Whipple,* 1 Gray, 317; *Borden* v. *Boardman,* 157 Mass. 410, 32 N. E. 469; *Aldrich* v. *Carpenter,* 160 Mass. 166, 35 N. E. 456.) In the United States courts the same rule obtains. (*Second Nat. Bank* v. *Grand Lodge of Free & Accepted Ancient Masons,* 98 U. S. 124, 25 L. Ed. 75; *Keller* v. *Ashford,* 133 U. S. 621, 10 Sup. Ct. 494, 33 L. Ed. 667; *Constable* v. *Steamship Co.,* 154 U. S. 73, 14 Sup. Ct. 1062, 38 L. Ed. 903; *Austin* v. *Seligman* (C. C.) 18 Fed. 520; *Anderson* v. *Fitzgerald* (C. C.) 21 Fed. 294; *Woodland* v. *Newhall's Adm'r* (C. C.) 31 Fed.

440; *Sayward* v. *Dexter, Horton & Co.*, '72 Fed. 765, 19 C. C. A. 182.)

Messrs. Cullen, Day & Cullen, for Respondents.

The defendant bank, having a duty to perform under the agreement, was advised of it, and had a copy of it, which it still had in its possession on the 28th day of September, when payment of certain moneys was made to the plaintiffs in the action. Though having the deeds of the interests of Messrs. McDonald and Cooney in escrow, to be delivered on payment of the amounts due them, respectively, and having likewise in its possession the agreement by which money was to be expressly provided for the payment of these sums to plaintiff, it did not notify them of the existence of the agreement, or of the provisions it contained for their benefit, and suffered them to enter into a transaction with Miller; they being misled at the time into the supposition that Miller was still to receive another $100,000 as an additional payment on account of this sale. Messrs. Nimmo and Mitchell, in pursuance of their agreement, organized a company called the "Diamond Hill Gold Mines Company, Limited," and on the 28th day of September, 1896, pursuant to their said contract, and through the said company, they paid, or caused to be paid, to the defendant bank, the said two sums of £5,000 and £15,000, which, as we have already seen, were, in part at least, to be devoted to the payment of these plaintiffs, whatever balance there might remain of the purchase price of the Diamond Hill mines. It was under these circumstances that the defendant bank paid to plaintiff McDonald $15,000, leaving $15,000 still due, and the plaintiff Cooney $7,000, leaving $10,000 due him. It had the money then in its vaults to pay both of the plaintiffs in full. It knew of the agreement between Miller and Nimmo and Mitchell, and it stood by and permitted the plaintiffs to take the worthless note of Miller for the sums it had contracted to pay to him, and had not done so.

Appellant, in its brief, does not pretend that it was not competent for the bank thus to act as a trustee, and we might, perhaps, pass the matter without comment, but we think that there can be no doubt of its competency to act in this character. (*Isham* v. *Post,* 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 787.) Numerous cases might be cited showing that, where banks have undertaken to discharge a duty similar to that imposed on the defendant in this case, they have been held not liable, where they have discharged such duty without negligence on their part; and liable in every case where there was such negligence or bad faith. Another class of cases upon which there are numerous decisions are where specific deposits have been made for specific purposes, and there it is uniformly held that the bank must discharge its duty with reference to such deposits according to the instructions given it so to do, and, if it does not do so, it is liable. A specific deposit is one made for a specific purpose, and where, as in the case at bar, money is deposited to be paid to an individual, the bank must obey the instructions if it receives the deposit; otherwise, it will be liable to the party injured for its misapplication of the funds. (*Judy* v. *Bank,* 81 Mo. 404; *Bank* v. *O'Hare,* 119 Ill. 646, 10 N. E. 360; *Bundy* v. *Town of Monticello,* 84 Ind. 119; *Walker* v. *Bank* (C. C.) 25 Fed. 247; *Jaudon* v. *Bank,* 8 Blatchf. 430, Fed. Cas. No. 7,230; *Merchants' Nat. Bank of Fort Worth* v. *Phillip & Wiggs Mach. Co.,* 15 Tex. Civ. App. 159, 39 S. W. 217.) In the case at bar it must be held, under the terms of the seventh subdivision of the agreement quoted above, that the defendant bank undertook the duty of ascertaining the amount due from Miller to McDonald and Cooney on account of the purchase price of the mine, and that it undertook to pay out of the funds deposited for that purpose the sums so found due them. So far as the amounts, respectively, due to the plaintiffs were concerned, it had actual knowledge, as it held the deeds for their respective interests in escrow. It further undertook as a part of its agreement not to pay any money to Miller until it had first satisfied out of this specific

fund the amounts due these plaintiffs. Under these conditions it cannot be said that the money was not deposited for the benefit of McDonald and Cooney, or that the bank, by accepting the deposit, was not bound to apply the money in accordance with the terms of the contract. It had an active duty to perform, and it cannot free itself from this duty without showing such performance. The burden of proof was upon it to show that it had paid the plaintiffs in full, as was provided by the terms of the agreement under which it held the money; or that, if it had paid them a less sum, that the sum was paid to and received by plaintiffs, they having a full knowledge of all of the surrounding facts and circumstances, and expressly consenting thereto. (*Hall* v. *Marston,* 17 Mass. 574.) We think we are not mistaken in saying that, under the circumstances disclosed by the testimony in this case, the bank became a trustee for the benefit of these plaintiffs, and that it must be charged with liability as such. (2 Abb. Law Dict. tit. "Trusts;" 27 Am. & Eng. Enc. Law, p. 3; *Mannix* v. *Purcell,* 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562; Civil Code, Secs. 2951, 2953, 3001.)

The knowledge and acquiescence of the beneficiary at the time of its creation has never been held to be necessary to the creation of a trust. It is sufficient if he assents when he learns of it, and where it is for his benefit his assent will be presumed. It is contended that there was nothing owing from Nimmo and Mitchell to the plaintiffs, and therefore that there was no consideration for the trust. To this contention two answers are pertinent: First, the relation of plaintiffs to the title to the property in question was of itself a sufficient consideration to uphold the trust; second, it needs no consideration to support it, as between these beneficiaries and the trustee. A trust which has been executed so far as the settlor is concerned cannot be defeated by the trustee for want of consideration. The trustee cannot take the money under the trust agreement, use it for his own benefit, and then dispute with the *cestui que* trust the validity of the agreement by which alone he obtained possession

of the fund. (*Benjamin* v. *Gill,* 45 Ga. 110; *Smith* v. *Sutton,* 74 Ga. 528; *McLeran* v. *Melvin,* 56 N. C. 195; *Irby* v. *Kitchell,* 42 Ala. 438.)

The proposition that, where money is paid by one party to another for the benefit of a third person, such third person may enforce the payment thereof in law, has given rise to many conflicting decisions; but the proposition is set at rest in the state of Montana by Section 2103 of the Civil Code, which declares that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." The conflict in the authorities has mainly arisen upon the question as to whether such contract could be enforced at law, or whether the beneficiary must resort to an equitable action. It has been repeatedly held that, owing to want of privity between the trustor and the beneficiary, it could not be enforced at law; but it has always been the rule in equity, when money has come into the hands of a promisor under his agreement to devote it to a certain purpose, that equity would compel him to devote it to that purpose at the suit of the beneficiary. All question with reference to this matter is, we think, set at rest by the section just quoted; and under the reformed method of procedure uniting legal and equitable remedies the duty to pay over the money can be enforced in an ordinary action for money had and received, as in the case at bar. (*McLaren* v. *Hutchinson,* 22 Cal. 188, 83 Am. Dec. 59; *Tyler* v. *Mayre* (Cal.), 27 Pac. 160; *Walden* v. *Karr,* 88 Ill. 49; *Williams* v. *Haskin's Estate,* 66 Vt. 378, 22 Am. St. 117, 29 Atl. 371; *Hirsh* v. *Auer,* 146 N. Y. 13, 40 N. E. 397; *Lawrence* v. *Fox,* 20 N. Y. 268; *Hutchings* v. *Miner,* 46 N. Y. 456, 7 Am. Rep. 369; *Mellen* v. *Whipple,* 1 Gray, 317; *Fotlansbee* v. *Johnson,* 28 Minn. 311, 9 N. W. 882; *Stevens* v. *Flannagan,* 131 Ind. 122, 30 N. E. 898; *Morgan* v. *Mining Co.,* 37 Cal. 534; *Second Nat. Bank of St. Louis* v. *Grand Lodge F. & A. Masons,* 98 U. S. 123, 25 L. Ed. 75.)

Can there be any doubt that in the case at bar funds came to the defendant bank which in equity belonged to these plain-

tiffs? Can there be any doubt that, had these plaintiffs been informed that there were funds in the hands of the bank set apart for the payment of their demand, they would not have consented, and received only a part of the same, and the worthless notes of John S. Miller for the balance due them? Can there be any doubt, under the authorities, that the bank, by receiving the funds under the contract, undertook to pay the plaintiffs in full? In *Keller* v. *Ashford,* 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667, it is held that a mortgagee can maintain a suit in equity in the federal court against a grantee of mortgaged premises, who has assumed the payment of the mortgage, and in the opinion of Mr. Justice Gray is to be found a very full discussion of the reasons why suit in equity can be maintained upon promise made for his benefit by a third person, when such person could not maintain an action at law upon the same promise. A very complete note upon the subject of promises for the benefit of third persons, and the right to maintain actions thereon, is to be found in *Sanders* v. *McMillian,* 39 Am. St. Rep. 31 (s. c. 11 South. 750), in which the annotator says that the prevailing doctrine in this country is that the third person for whose benefit the promise is made may sue on it in his own name, whether made with or without his knowledge.

From the foregoing authorities it would seem to be plain that the bank, by the acceptance of the money under the terms of the agreement, assumed the relation of trustee to these plaintiffs, to pay over to them the full amount of money due them from John S. Miller. This duty was absolute, and could not be discharged by the payment of a less sum of money by the bank, unless it had communicated the information which it had that a sum of money more than adequate for the purpose had been provided for the payment of these claims, and that this payment was the last to be made to Miller on account of the sale of the property. Neither was it sufficient for the bank to assume that plaintiffs had full knowledge of all the facts by reason of their relations with Miller. It was the duty of

the bank, as trustee, to ascertain definitely what knowledge they had; or, in other words, to inform them completely of the duty which it had assumed.

The relation which the bank sustained to the plaintiffs was unquestionably that of an express trust for their benefit. Messrs. Nimmo and Mitchell were the trustors, the bank the trustee, and the plaintiffs the beneficiaries; exactly fulfilling the provisions of Civil Code, Sec. 2953. It is then equally beyond doubt that the bank was held to the utmost good faith in dealing with this trust. Our statute declares that a trustee may not obtain any advantage over the beneficiary by concealment, and is bound in all dealings with the beneficiary to the highest good faith. (Civil Code, Sec. 2970.) When it accepted this trust it bound itself to conform strictly to the directions contained in the instrument by which the trust was created. (2 Pom. Eq. Jur. Sec. 1062.) It was therefore the duty of the bank, inasmuch as it was taking upon itself the discharge of the trust in a way and manner not in conformity with the provisions of the instrument creating the trust, to give full information to the plaintiffs of the condition of the trust. This could have only been done by exhibiting to the plaintiffs the contract creating the trust, or giving them full information otherwise with reference to its terms and provisions. A concealment of the trust, whether intentional or otherwise, was a form of actual fraud, and rendered the bank liable for such damages as the plaintiff sustained by reason of its failure so to disclose the contract. (*Id.* Secs. 902, 3901.) It is a fundamental principle that a trustee in dealing with a *cestui que* trust, or in the management of the trust estate, must always show *uberrima fides.* (*Bound* v. *Railroad Co.* (C. C.), 50 Fed. 854.) Concealment is a breach of the trust. (1 Story, Eq. Jur. 214.) A trustee will always render himself liable where there is a concealment of a material fact which it is his duty to disclose. (*Id.* 217.) A trustee cannot, by the suppression of a fact which ought to be known to his beneficiary, entitle himself to a benefit. (*Id.* 220.) Men are not to

be entrapped by the fraudulent contrivance or cunning of those who purposely misled them. (*Id.* 222; 27 Am. & Eng. Enc. Law, 191.) If a party innocently misrepresents or conceals a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition on the other party. (*Juzan* v. *Toulmin,* 44 Am. Dec. 453.) The burden of proving the perfect good faith of the transaction between a trustee and the beneficiary is always upon the trustee. (27 Am. & Eng. Enc. Law, 193; *Pairo* v. *Vickery,* 37 Md. 467.) Acceptance of the trust by the trustee is presumed from his dealings with the trust property. (2 Pom. Eq Jur. Secs. 1007-1060.) The fact that the bank had in its possession the deeds in escrow and the agreement under which the trust was created raises the conclusive presumption that it had knowledge of the contents of the agreement, and it could not set up ignorance of the contents of such agreement. (2 Whart. Ev. Sec. 1243.)

It is sufficient, so far as plaintiffs are concerned, to show that the transaction of September 28, 1896, about which they were testifying, was made in utter ignorance of their rights, and would not have been made had they been apprised of the true state of affairs. Not only this, but the plaintiffs were misled into accepting partial payments of their claims through misrepresentations made by Johnson, the cashier, or by Miller in his presence, and not contradicted by Johnson. There is no dispute between the parties that $96,800 was received, and that by the express provisions of article 7 of the agreement the bank was to pay so much of this money to the plaintiffs, McDonald and Cooney, as remained unpaid on account of the purchase price of their interests in the Diamond Hill Mines. The defendant did not discharge its duty under this agreement, and concealed from the plaintiffs the true condition of affairs, and misrepresented to them the actual facts in the case. The appellants say that, "if we surrendered any rights through misrepresentation, our remedy is by an action for damages for the deceit," but they do not undertake to say that, "if the bank, by reason of having plaintiffs' deeds in escrow, and by reason

of the fact that they received this money, promised to pay it to us for the amount due on said deeds, we may not have exactly this sort of action against it;" and the authorities which we have already cited show most conclusively that this was so. They say the orders and consents by plaintiffs were admissible in evidence for the defense. We might add to this that, if the "orders and consents" made by plaintiffs had been made with a full knowledge on their part of the actual conditions of the trust, and that the money was in the bank to pay them in full, such "orders and consents" would have been absolutely conclusive. As they did not have this knowledge, and were misled by misrepresentations made by their trustee, or in his presence, and not contradicted by him, they cut no figure, other than to show the circumstances under which the transactions took place. It is said that an indefinite agreement as to amounts will not support *assumpsit*. Granted. But there was nothing indefinite about the agreement in this case. The bank, our trustee, had in its possession the deeds, and full information as to what amounts were due thereon, upon the payment of which into the bank to the credit of the plaintiffs they were authorized to surrender the deeds. Where it is the duty of a party by contract or otherwise to remit or apply money in his hands, and he fails to do it, no demand is necessary before bringing suit against him for such money. (*Ferguson* v. *Dunn's Adm'r*, 28 Ind. 58; *Caterlin* v. *Somerville*, 22 Ind. 482; *Stacy* v. *Graham*, 14 N. Y. 492.)

We have already seen by the authorities which have been cited that this defendant, having received this money under a promise to dispose of it in a certain way, and not having done so, is estopped from denying that the plaintiffs were strangers to the contract, or that said contract was not based upon sufficient consideration, or that there was no privity between the plaintiffs and the trustor. They say it was not made for the benefit of plaintiffs, nor either of them. In view of the fact that they are expressly named in the agreement, and that the bank received £20,000 under an agreement that it would pay

to these persons the amounts due them, it is hard to see upon what ground appellant can contend that this agreement was not made for the benefit of the plaintiffs. If the seventh subdivision of this agreement is not for the benefit of plaintiffs, in what manner would it have to be made, or what would have to be its form and substance, in order to be a contract made for their benefit?

Since this brief has been in print, 71 Am. St. Rep. has been issued, and in it we find a very complete monographic note on contracts for the benefit of third persons, appended to the case of *Baxter* v. *Camp,* to which we desire to call the attention of the court, particularly to the discussion of the "American rule," found on page 182, and "Contracts to pay the debts of another," on page 199 (s. c. 41 Atl. 802). We also desire to call the court's attention to *Merriman* v. *Moore*, 90 Pa. 78.

Upon the question of consideration necessary to support such contract, and the privity required, we also beg leave to call attention to the following authorities: "A valuable consideration, in the sense of law, may consist either in some right, interest, profit or benefit accruing to one party, or some detriment, loss or responsibility given, suffered or undertaken by the other." (3 Am. & Eng. Enc. Law, 831; 2 Kent. Comm. 465; *Rector, etc. St. Mark's Church* v. *Teed,* 120 N. Y. 583, 24 N. E. 1014.) "A consideration, however slight, is sufficient, provided there is no fraud in the transaction." (*Spangler* v. *Springer,* 22 Pa. 454; *Pierce* v. *Fuller,* 8 Mass. 223, 5 Am. Dec. 102.) "The consideration is sufficient if it arises from any act of plaintiff from which the defendant or a stranger derives any benefit, however small." (*Esling* v. *Zantzinger,* 13 Pa. 50; *Hind* v. *Holdship,* 2 Watts, 104, 26 Am. Dec. 107.) "Where a contract creates a duty or relation in the nature of a trust, the action is maintainable, the consideration retained being regarded as held in the nature of a trust for the persons indicated by the contract." (*Follansbee* v. *Johnson,* 28 Minn. 311, 9 N. W. 882.) "A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust,

within the meaning of the statute." (*Lake* v. *Albert,* 37 Minn. 453, 35 N. W. 177.) "The consideration must move to the defendant, either from the plaintiff or the promisee." (*Wyman* v. *Smith,* 2 Sandf. 331-337.) "The placing of money in the hands of the promisor under his promise to pay it over is a sufficient consideration." (*Perry* v. *Swasey,* 12 Cush. 36; *Wyman* v. *Smith,* 2 Sandf. 337; *Kolloch* v. *Parcher,* 52 Wis. 393, 9 N. W. 67; *Lucas* v. *Chamberlain,* 8 B. Mon. 276; *Guthrie* v. *Kerr,* 85 Pa. 303.) "And the payment of the money to the promisor creates a sufficient privity of contract to enable the third party to recover." (*Esling* v. *Zantzinger,* 13 Pa. 50; *Hall* v. *Marston,* 17 Mass. 575; *Perry* v. *Swasey,* 12 Cush. 36; *Frost* v. *Gage,* 1 Allen, 262; *Jones* v. *Higgins,* 80 Ky. 409; *Brewer* v. *Dyer,* 7 Cush. 337.) There is not a case cited in appellant's brief which is in any particular like the case at bar, and not one cited that tends in any way to hold that in a case like the one at bar the plaintiffs might not recover.

Messrs. McConnell & McConnell, for Respondents.

(1) The central point around which all the facts group themselves, and upon which the appellant must be held liable, if at all, is paragraph 7 in respondents' Exhibit A. Upon this paragraph we observe: (a) That it provides that said £20,000 are not to be paid to said John S. Miller. (b) Said money was to be forwarded to the American National Bank of Helena, Mont. (c) It was to be applied by the said bank in paying off and discharging such "attachments, liens, incumbrances, claims and demands as may then exist against said properties, and in paying off and discharging such moneys as may then be owing from the said John S. Miller to John B. Wilson, Thomas D. Cooney and Angus A. McDonald for the unpaid purchase price of said properties." (d) That "only the surplus," if any, after the payment of such claims, was to be paid to said John S. Miller. The rest of the paragraph is immaterial, so far as this controversy is concerned. We further observe that respondents, McDonald and Cooney, and Wilson had been co-owners with

Miller in these propertites, which had been sold to Nimmo and Mitchell; but before said sale said respondents and Wilson had sold their interests on a credit to Miller, or at least very little had been paid thereon, and there were large balances due to respondents and Wilson; that in these sales deeds were executed by McDonald and Cooney to Miller, and placed in escrow in the American National Bank, the appellant, to be delivered to Miller upon payment by him of the balance of the purchase money due them respectively. About this there is no controversy. This fact was unquestionably known to Nimmo and Mitchell when they entered into the contract Exhibit A; hence the provision in clause 7 for the payment to Wilson, Cooney and McDonald of the unpaid purshase price of the properties. The trustors were directly interested in respondents. It was necessary for them to have these deeds in order to perfect their title. They sent the money to appellant, with directions to pay the same directly to respondents in redeeming these deeds. It further appears, as we will show in the proof, that an attachment had been levied upon the properties by Fraser & Chalmers. It is manifest that Nimmo and Mitchell intended by the provisions of paragraph 7 to apply a sufficient amount of the money sent to appellant directly to the payment of these incumbrances, claims or demands against the property, and to the payment of the unpaid purchase money due to these respondents from Miller. It is further manifest that they did not intend that there should go into the hands of Miller any of this money except the surplus which might be left after discharging these claims against the property. The proper construction of this paragraph is that it was only such debts and liabilities of the old Diamond Hill Mining Company as constituted a lien upon the properties, and would thereby cloud the title, that were intended to be paid out of the money sent to appellant. It will be noted that the character of the claims outside of those belonging to Wilson and respondents, which were to be paid was "attachments, liens, incumbrances, claims and demands as may then exist against said properties." The general indebtedness of the

Diamond Hill Mining Company, which did not constitute any lien or other claim or demand against the properties, was not intended to be, and was not, embraced. Nimmo and Mitchell, as purchasers, had no concern about the outside indebtedness of the Diamond Hill Mining Company. The proof only shows one debt outside of these vendors' debts which came within the provisions of this paragraph, and that was the debt of Fraser & Chalmers. Nimmo and Mitchell were especially anxious that Wilson and respondents should be paid, because otherwise Miller could not get title to their interests. There was an abundance of money to pay off all the outside demands against the property, and to have paid Wilson and respondents in full. It was the duty of appellant, under the trust reposed in it by the remitter of the money, to have ascertained the amount of these incumbrances, and the amounts due to respondents and Wilson, and have paid the same to the several parties to whom said amounts were due. It was "only the surplus" which was to be paid to Miller.

(2) The appellant accepted this money through its cashier, Mr. Johnson, and assumed to execute the trust reposed in it under said paragraph 7. Upon receipt of the money by the appellant, it became vested with such title to the money as would enable it to discharge the duty created by the contract, and in the manner directed by the contract. A duty arose out of the contract when the money was accepted binding appellant to pay said money to the parties named in the contract. These parties immediately became beneficiaries in this fund. Not a dollar of it belonged to Miller, nor could it, without a violation of the contract under which it was received, be paid to him, except the surplus left after paying the creditors described. The gist of this whole controversy, then, is, did the conditions above set out create a trust in which Mitchell and Nimmo were trustors, the appellant was trustee, and the creditors named were beneficiaries? For whom did appellant hold this money after it received it? Nimmo and Mitchell had parted with it. It was in the possession of appellant. It was not appellant's money.

"Only the surplus" was Miller's money. The remainder was the money of these creditors. It could belong to no one else. The appellant owed no duty to Miller under the contract, except to pay him the surplus. It owed a duty to the creditors described to the extent of paying them the money necessary to satisfy their demands.

(3) It is hardy necessary to refer to the common-law authorities on the subject of what constitutes a trust, because the provisions of our Civil Code cover the whole subject. Section 2951 defines a voluntary trust to be "an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another." Can any transaction be brought more perfectly within this definition than the case at bar? The elements of "personal confidence reposed" and "voluntarily accepted" for "the benefit of another" all enter into the case at bar. The respondents were the persons in part for whose benefit the confidence of the remitter was reposed in appellant. The statute further defines and gives technical names to the parties to the trust. (Section 2953.) Section 2954 clinches the matter when it provides: "Every person who voluntary [voluntarily] assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control." Is it not clear that, by virtue of the confidence reposed in the bank by the trustors, the money which came into its hands became subject to its control? We think we have demonstrated, then, that the bank was a trustee, and held this money in trust for the creditors named in the instrument creating the trust. Now, how did it discharge this duty? There underlies a great deal of the argument of counsel for appellant this fatal error: He assumes that what McDonald and Cooney did was as obligatory upon them as if they had done it with the full knowledge of their rights under this contract. He seems to ignore the fact

that, when they accepted $15,000 and $7,000, respectively, of this money from appellant, and surrendered their deeds to Miller, thereby they waived any right which they had under this contract to any more of said money than they actually received. Can it be supposed that, if they had been made acquainted with the provisions of this contract, and the duty of the bank to pay the money to them, they would have waived such right? The money was in the hands of the bank for them. It was not Miller's money, but theirs. They took Miller's worthless notes, and let him have their money, and all because they were ignorant of the fact that it was their money. Mr. Johnson was silent when it was his solemn duty to speak. It was in the hands of the trustee for them, and the trustee, with this contract right under his eyes, paid to Miller the $25,000 with which it had been intrusted for respondents. Respondents were in entire ignorance of their rights, and yet it is gravely argued that, because respondents accepted part of their money, and took Miller's notes for the remainder, that they thereby are estopped to complain of the appellant.

(4) From the evidence it appears that the appellant, through its cashier, had full knowledge, at the time this money was paid, of the contents of said clause 7. It is also uncontroverted that at the time the money was received by Mr. Johnson as cashier of the bank, McDonald and Cooney had no knowledge whatever of the provisions made in their behalf. It is undisputed that Cooney, McDonald and Wilson had sold their interests in the Diamond Hill Mines to John S. Miller, and had received some small payments therefor, and that said Miller owed McDonald some $46,000 and Cooney some $21,500 balance of purchase money; that at the time of such sale deeds were executed by said McDonald and Cooney to said Miller, and notes for the unpaid purchase money were executed by Miller, and said deeds and notes were placed in the American National Bank,—the deeds in escrow, to be delivered when the notes were paid, and the notes were placed there for collection; that about the 28th of September, 1896,—perhaps a day or two before this,—an

arrangement was made in contemplation of the money that was expected, and which came on the 28th of September, by which McDonald agreed to take the round sum of $30,000 for the balance that was due him, $15,000 of which to be paid out of the money expected, and Miller's note taken for $15,000, due in 60 days, to be paid out of another payment, which he represented was coming in some 30 days; that Cooney agreed to take the round sum of $17,000 for what was due him, $7,000 of which was to be paid in cash out of the payment expected, and the note of Miller was executed for $10,000, to be paid out of another payment, expected in about 30 days, as represented by Miller. An order was executed by McDonald, which was also signed by Miller, addressed to A. C. Johnson, cashier, directing him to pay out of the money to be received $15,000, and directing him to pay the $15,000 note out of the next payment. A similar order was executed by Cooney. It is a controverted fact as to whether Johnson represented to McDonald and Cooney, or either of them, that such further payment of $100,000 would be made. McDonald and Cooney both testify that he did, but he denies it. Miller also denies making any such promise. The sequel shows that no such money was to be paid, and that whatever representations were made to that effect were false. That Miller was guilty of willful falsehood when he testified that he made no such representation is fully shown by the following clause in the order which he signed to Johnson on the 28th of September, 1896, to-wit: "And also leaving with you his promissory note in my favor in the sum of $15,000, payable on or before 60 days after date, with the understanding that you shall retain that sum out of the next payment from the sum paid in on the sale of said mines, and place to my credit when so received." Miller's name is signed to this order, and it unquestionably refers to a future payment which he had represented to McDonald would be made through the bank, and out of which said note was to be paid. Johnson received this order, and he unquestionably knew that McDonald was expecting other money. Unquestionably the contract Exhibit A gave all the terms of the

sale, and in it could have been found the provision as to cash payments. If it contained no provision for another $100,000, then Miller invented this for the very purpose of misleading McDonald and Cooney, and getting them to take his notes for a part of their money. We do not say that Johnson made any representations on this subject. If he did, it was probably done upon the representations made by Miller. It is immaterial whether he did or not. It is enough that he had in his possession the contract which provided for the payment in full of respondents; that he had his attention called to the contract, and looked over it just before this transaction was closed, and made no disclosures to either of them of their rights thereunder. Respondents were placed between the devil and the deep sea,—the false representations of Miller by which they were deceived into taking his notes, and the profound silence of Mr. Johnson when it was his duty to speak. Mr. Johnson, by this course, made it possible for Miller to consummate his fraud upon respondents. He was guilty of a legal wrong in the violation of his plain duty to respondents under the contract. It is undisputed that the money would not have been paid until the titles of respondents were vested in Miller. Deeds of conveyance of McDonald, Cooney and Wilson had been executed at the time they sold their interests to Miller, and had been placed in escrow in the bank of appellant, and they were the deeds which Nimmo and Mitchell or their associates or successors had to have in order to get a title to the property which they had purchased, and for the getting of which they had made the provisions in clause 7 of the contract. Johnson must have known the exact sums coming to respondents before this money was paid out, as the same were fully disclosed in the orders given him for the delivery of the deeds.

As we have seen, the only liens, or incumbrances, or demands against the property which it was necessary for him to remove in order to be able to make a good title was the money due the vendors, and about $2,200, for which an attachment had been levied. $50,000 would have paid off respondents and Fraser

& Chalmers, and just what sum would have paid off Wilson is not disclosed, but the fact that he had a cash payment of $9,000 shows that the balance due him could not have been much more than the balance due Cooney. Nor could it make any difference as to whether the amount which the old Diamond Hill Mining Company owed appellant, which amounts to some $16,822 according to Miller, and some $13,000 according to Mr. Johnson, and upon which respondents were liable, would have been in the way of delivering said deeds. This indebtedness was no lien or demand against the property. Its payment was not provided for by the contract, but this could have been paid also, and respondents paid in full. The payment of this latter debt, however, was a matter entirely between respondents, Miller and the old Diamond Hill Company. It is claimed that McDonald insisted that this debt should be paid. Granted that this is true, it makes no difference, so far as the appellant's liability is concerned. It was no part of its duty in handling the money intrusted to it under the contract to pay these debts. We will not allow ourselves to believe that the fact that the appellant was interested in collecting this money due it had anything to do with its silence in relation to the provisions of paragraph 7 at the time this money was disposed of. But it is obvious that the appellant was interested in getting this money. The appellant, instead of paying to Miller "only the surplus," placed the whole sum of $96,800 to his credit, and paid it out upon his checks. This court cannot say that this money was all paid out under the provisions of said paragraph 7. And, even if it was so paid out, by what authority were these other debts, which constituted no incumbranace upon the property, paid in full, and respondents' debts, the most important of any, as they were for the very property itself, should be only paid in part? It can make no difference whether Nimmo and Mitchell paid said money to the bank, so it was paid to it for respondents under their contract. The bank received it under their contract, and they became trustors to it. It does not concern the bank from what source the money came. What one does through another he does himself.

(5) Appellant objected to the introduction of Exhibit A upon the ground that it was incompetent, irrelevant and immaterial, in this: Plaintiffs McDonald and Cooney are both strangers to the said paper, and are not entitled to any rights or benefits thereunder; there is no privity between plaintiffs; that said contract was not for the benefit of plaintiffs, and that it had been fully performed by the parties. In an action for money had and received it is not necessary that plaintiff should have anything to do with the paper or other instrument by which the defendant received the money for the use and benefit of the plaintiff. An action for money had and received is at common law a technical designation or a form of declaration in *assumpsit,* wherein the plaintiff declares that the defendant had and received certain money, etc. "The action will lie to recover money to which the plaintiff is entitled, and which in justice and equity, when no rule of policy or strict law prevents, the defendant ought to refund to the plaintiff. No privity of contract between the parties is necessary to sustain the action, except that which results from the possession by the defendant of the money which in equity belongs to the plaintiff." (Maxw. Code Pl. 247; 1 Estee, Pl. Prac. Sec. 838.) Mr. Estee says: "The general rule is that an action for money received lies whenever money has been received by the defendant which *ex aequo et bono* belongs to the plaintiff, or which in equity and conscience he has no right to retain, whether there be any privity between the parties or not." We hardly think that it can be seriously contended that said clause 7 in Exhibit A was not expressly or otherwise made for the benefit of the respondents. Mitchell and Nimmo had contracted to purchase the properties of the Diamond Hill Mining Company from Miller. In order to perfect the title in Miller, it was necessary to have the deeds of plaintiffs, held in escrow in the American National Bank, delivered to him, or to some one for him. In order to do this, it was necessary to pay the respondents the balance of the money due to them from Miller for the purchase of their interests in the properties of said company. Now, to do this, clause

7 was drawn, in which there is an express provision to pay the respondents their money. This certainly was a contract made for their express benefit. The objection that the contract had been fully performed by the parties is not true in point of fact. It had not been fully performed. A full performance would require appellant to pay the plaintiffs all of their purchase money. The fact that plaintiffs had ordered the deeds delivered, and accepted payment in part in the notes of Miller, when done in ignorance of their rights under said Exhibit A, cannot constitute a full performance of the contract.

It is not true, as we have seen, that "the evidence uncontradicted shows that all the money referred to in the case, to-wit, $96,800, was paid out by the defendant bank as it was directed to do by the remitter thereof." The remitter, in clause 7, directed appellant to pay plaintiffs their money in full. Instead of this, it paid them only a part. The remitter further directed appellant to pay off other creditors who had demands against the property. There was only one other such demand, as we have seen. This was paid in full. This was the only act which appellant did which was in full accordance with respondents. They must deal with them, and bring them within direction of the remitter. The appellant paid all of the balance of the money to Miller, including the balance which was due plaintiffs, and which was not paid. The direction of the remitter was to pay "only the surplus" to Miller after satisfying plaintiffs' demands in full. Instead of doing this, appellant permitted plaintiffs to accept the worthless notes of Miller for an aggregate sum of $25,000, and gave the money to Miller in direct violation of the instructions of the remitter, which required it to pay this money to respondents.

Counsel for appellant argues that: "The company had no concern for Miller's debts or his creditors. It owed no duty or obligation to plaintiffs and sought only its own protection. To Miller it was a matter of indifference whether the money paid certain claims or went to him. Only Miller, the company or Nimmo and Mitchell could complain of any breach of con-

tract by the bank." This argument does not state the whole case. The deeds to a part of the mines purchased were in escrow in the bank. Respondents were the makers of those deeds. Under the escrow agreement they could not be delivered until the purchase money due from Miller to respondents was paid. Nimmo and Mitchell, or their successors, were brought face to face with this proposition. They were not willing to pay the money to Miller, and trust him to use it to obtain these deeds; but they chose to deal directly with the respondents. Hence they sent the money to appellant, and reposed in it that confidence which they withheld from Miller. These purchasers were interested directly, and concerned with respondents. They must deal with them, and bring them within the provisions of this contract, in order to get the deeds necessary to vest a complete title in Miller, upon whose deed they had to depend for a title to the mines they had purchased. This course of dealing brought into the hands of appellant money devoted specifically to the benefit of respondents. No clearer case of money having been received for the use and benefit of another can be presented than the facts of this case make. Appellant is more than the agent of Nimmo and Mitchell, or their successors, charged with the duty of seeing that a good title is obtained. Appellant is intrusted by Nimmo and Mitchell with a sum of money, and charged with the duty of paying it to the respondents. The acceptance of this money was an agreement on the part of appellant to perform a double duty,—one to the remitter, and the other to respondents. It stood as a middleman burdened with a twofold duty. It is the trustor who reposes the confidence. It is the beneficiary whose interests are affected thereby. This double duty makes the appellant more than a simple agent. The relation of trustor and trustee between appellant and the remitter and the relation of trustee and beneficiary between it and respondents sprang into existence immediately upon the receipt of the money under the contract by appellant. The motive which induced the remitters to make this contract might have been to promote their

own interests. It was made for the benefit of respondents all the same. The question of the motive cuts no figure. Nothing can be plainer than that the contract was made for the benefit of the plaintiffs, while it at the same time subserved the interests of these purchasers.

It is claimed that it was essential to the bringing of this action that a demand should have been made by respondents of the appellant for the money claimed. There is no assignment of error upon this point in the record. It should, therefore not be noticed in this appeal. This is specified as a ground why plaintiffs should not recover in the argument of counsel under the heading of "the court erred in overruling and denying defendant's motion for a new trial." While the court found as a fact that no demand was made, it also found as a matter of law that no demand other than the bringing of the suit was necessary in order to maintain this action. This is not specified as error in the assignment of errors of law occurring on the trial. Indeed, the attention of the court below upon the motion for a new trial does not seem to have been called to this matter. But, aside from this, we insist, under the authorities, that no demand was necessary. (*Cox* v. *Delmas,* 99 Cal. 120, 33 Pac. 836; *Parrott* v. *Byers,* 40 Cal. 622.) The above decisions were rendered in 1893. No reference is made to the California statute whatever, notwithstanding that state had long had a statute of which our Section 2451 of the Civil Code is an exact copy. (See, also, 1 Estee, Pl. Prac. Sec. 836; *Stacy* v. *Graham,* 14 N. Y. 492; *Howard* v. *France,* 43 N. Y. 593.) We do not think that Section 2451 of the Civil Code has any reference to a trustee of an express trust, such as appellant was in this case.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

By consent of the parties these causes were consolidated and tried together in the court below. The actions are for moneys received on September 28, 1896, by the defendant bank from

one Nimmo and one Mitchell, of Glasgow, Scotland, to and for the use of the plaintiffs. The plaintiff McDonald alleges in his complaint that the defendant so received for his use $19,230, and the plaintiff Cooney alleges in his complaint that the defendant so received $10,000 for his use. On these averments issues were joined and the causes tried by the court sitting without a jury. McDonald recovered a judgment for $17,942.15, and Cooney recovered a judgment for $11,543.25. From each judgment and from the several orders denying new trials the defendant has appealed.

Distinguished counsel have with a wealth of learning and with great ability argued and discussed at length many questions which we find not to be necessarily involved in the determination of these appeals. Abstracts of their briefs will be preserved in the report of this case. Some of the differences between counsel arise, we think, from a failure to give full significance to the facts. The transactions disclosed by the evidence created relations and rights that may be easily ascertained by the application of a few elementary principles of law.

In respect of the facts there was but little controversy. Between the testimony given by one Johnson, the cashier of the defendant bank, and one Miller, and that given by the plaintiffs, some conflict existed; but whatever the evidence in behalf of the prevailing parties tended to prove must, for the purpose of these appeals, be considered as established. So viewing the evidence, the material facts, concisely stated, are these: The plaintiffs, one John S. Miller, and one Wilson, owned in common certain mining claims called the "Diamond Hill Gold Mines." McDonald agreed to sell, and sold, his interest to Miller for $50,000, and Cooney agreed to sell, and sold, his interest to Miller for $25,000. McDonald's deeds of conveyance were placed in the defendant bank in escrow to be delivered to Miller upon the payment of the full purchase price. The deeds of conveyance made by Cooney were delivered directly to Miller, the grantee, who placed them with the defendant bank; and Cooney also left with the defendant bank for collection the notes of

Miller for the unpaid purchase price of Cooney's interest in the mines. On the 7th day of August, 1896, Miller entered into a contract with Nimmo and Mitchell, who resided in Scotland, by which he agreed to sell either to them or to a corporation or joint stock company to be organized by them, and they for themselves and such corporation or joint stock company agreed to purchase from him, the Diamond Hill gold mines. The sixth and seventh paragraphs of the contract are as follows: "Sixth. It is further understood and agreed that a loan of fifteen thousand pounds at the same rate of interest as that of the debenture stock is to be made to said John S. Miller by said company when it is organized. As security for this loan, said Miller is to hand over to and pledge with said company, to be registered as it may direct, twenty thousand pounds of preference shares and twenty thousand pounds of ordinary shares of said company; and said Nicholas F. Cleary is to hand over to and pledge with said company ten thousand pounds of such preference shares. * * * Seventh. It is further understood and agreed that the second cash payment of five thousand pounds and the loan of fifteen thousand pounds are not to be paid directly to said John S. Miller, but are to be forwarded at the time stipulated herein therefor to the said American National Bank of Helena, Montana, to be applied by the said bank in paying off and discharging such attachments, liens, encumbrances, claims, and demands as may then exist against said properties, and in paying off and discharging such moneys as may then be owing from said John S. Miller to John B. Wilson, Thomas D. Cooney, and Angus A. McDonald for the unpaid purchase price of said properties, and only the surplus, if any, after the payment of such claims, is to be paid to said John S. Miller, and clauses marked 'third' and 'sixth' of this agreement are hereby modified so as to conform to this clause." The plaintiffs knew nothing of the terms or conditions of this contract. Pursuant to the covenant of the contract in that behalf, a corporation or joint stock company, by name the Diamond Hill Gold Mines, Limited, was organized, and to this company

Miller was to transfer the properety upon payment of the specified purchase price. In accordance with the provisions of the seventh paragraph of the contract the company transmitted by draft to the bank twenty thousand pounds, the equivalent of $96,800 in currency of the United States. On September 28, 1896, the defendant bank received and accepted the remittance from the company. Accompanying the draft was a copy of the contract and the attention of the cashier was called to the seventh paragraph which contained the authority and directions with respect to the application and disposition of the funds. In receiving and accepting the draft and in all matters connected with the proceeds thereof the defendant acted through its cashier, one A. C. Johnson. Before the bank received the draft and between the 24th and 28th days of September, 1896, an agreement was made between Miller and the plaintiffs whereby the latter consented that the bank should pay to McDonald $15,000 and to Cooney $7,000 instead of $30,000 and $17,000, the remainder of the purchase prices due to them respectively, and that they would, in lieu of cash, accept Miller's notes for $15,000 and $10,000 for the remainder, the notes to be paid out of the next installment received from the Scottish purchasers. Miller had assured the plaintiffs that he was to receive a further payment of $100,000 within thirty days after September 28, and this statement of Miller was corroborated by the defendant's cashier. The plaintiffs knew the amount of the draft received by the bank. The bank was orally advised by Miller, McDonald and Cooney of the agreement that out of the $96,800 then held by the bank, McDonald and Cooney should receive $15,000 and $7,000, respectively, and no more. Pursuant to the agreement between them and Miller the plaintiffs on the 28th day of September, 1896, delivered to the bank written orders stating how much of the funds were to be paid to them. The order of McDonald instructed the bank to deliver to Miller the deeds in escrow upon his paying into the bank to McDonald's credit the sum of $15,000 and leaving with the bank his note in McDonald's favor for $15,000 payable

in sixty days after date, the bank to retain out of the next payment from the Scottish purchasers an amount sufficient to liquidate the note; the order from Cooney authorized the bank to surrender to Miller the notes then in the bank's custody upon Miller's depositing to Cooney's credit $7,000 and his note to Cooney for $10,000 due at thirty days. Upon Miller's cheques therefor the bank paid these sums to the plaintiffs, and disbursed in payments to other persons, including the bank itself, the remainder of the $96,800—all upon Miller's cheques, the money having been deposited to the credit of Miller. Neither McDonald nor Cooney was informed of the contents of the clause quoted, and not until December, 1897, about fifteen months after the transactions to which reference has just been made, did the plaintiffs learn that if they had not otherwise agreed with Miller they could have been paid in full out of the $96,800 remitted from Scotland, and that the written instructions touching the disposition of the funds directed that the plaintiffs be paid in full. No further remittance came from Scotland to the defendant bank and, the notes of September 28, 1896, not having been paid (except $250 on the note to Cooney) these actions were commenced.

The actions are for moneys received by the defendant bank from Nimmo and Mitchell to and for the use of the plaintiffs. Much argument has been advanced with respect to the liability of the bank for the supposed fraudulent misrepresentations of its cashier. It has been strenuously insisted that he was guilty of fraud and deceit in passively concealing from the plaintiffs the directions quoted in the seventh paragraph of the contract and at the same time representing that a further payment of $100,000 was to be made to Miller within thirty days, when he must have known from the contract that the draft for $96,800 was the final payment. If by fraud or deceit the plaintiffs were induced to waive or surrender any legal rights or sustained other injuries, they must seek remedies in appropriate actions. Unless the bank received money to and for their benefit they cannot prevail under the present pleadings.

The ultimate question is: Did the defendant receive from Nimmo and Mitchell, or the Diamond Hill Gold Mines, Limited, money to and for the use of the plaintiffs,—in other words, did the bank have in its custody or possession moneys or funds received from Nimmo and Mitchell or the company, to which, as against the bank, the plaintiffs were entitled? Counsel for the plaintiffs invoke the provisions of Title VIII of Part IV of Division III of the Civil Code, entitled "Trusts," insisting that the bank received and held the money sued for as a trust fund belonging to the plaintiffs, that Nimmo and Mitchell were the trustors of a voluntary trust, the defendant the trustee, and the plaintiffs the beneficiaries, and that the duty devolved upon the trustee to disclose to the beneficiaries the contents of the seventh paragraph of the contract between Nimmo and Mitchell and Miller. They call to their aid also Section 2103 of the Civil Code, which provides that "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it;" and this, they argue, conferred upon the plaintiffs the right to maintain the actions, even if a technical trust did not exist.

Miller purchased from the plaintiffs their interests in the Diamond Hill gold mines and he was indebted to them for the unpaid purchase price. Neither Nimmo and Mitchell nor the company bought or agreed to buy from the plaintiffs, and hence neither of the former was indebted to either of the plaintiffs or owed to them, or to either of them, any legal duty whatsoever with respect to the money to be paid to Miller as the purchase price. But as Nimmo and Mitchell knew that the plaintiffs held or had held interests in the properties, they determined not to make full payment directly to their vendor, Miller, but to send, or cause the Diamond Hill Gold Mines, Limited, to transmit, the purchase price or a sufficient part of it through such channels as would insure their own and their company's protection against adverse claims for the unpaid purchase price or for liens or incumbrances of any kind. Such method of payment was chosen from motives of self-interest

and not from any design to benefit the plaintiffs, nor in fulfillment of any duty or obligation to them. For these reasons, from these motives, and for the accomplishment of these ends, the Diamond Hill Gold Mines, Limited, sent to the defendant bank the remittance of $96,800, and directed it not to pay out any part of the funds to Miller except such as might remain after making the specific payment "of such moneys as may then be owing from said John S. Miller to John B. Wilson, Thomas D. Cooney and Angus A. McDonald for the unpaid purchase price of said properties." The defendant bank accepted this remittance or deposit subject to the terms and conditions thus lawfully imposed. It had no interest in the funds and no authority concerning them except such as were conferred by the directions of those who had conditionally deposited them subject to specific instructions.

What, then, was the legal relation of the several parties to the funds while thus in the custody of the bank? As we have said, the Scottish purchasers did not buy from the plaintiffs; they were under no obligation to them; they owed to them no duty and they owed to them no money. They did not agree to pay Miller's debts to the plaintiffs, but for their own protection made Miller agree that they or their corporate successor might send a part of the money due from them to Miller to the defendant bank with authority to pay the plaintiffs therefrom. When they authorized and directed the bank to pay the plaintiffs it was not because they had promised the plaintiffs to do so, but merely because they had required Miller to consent to that method of protecting themselves and pursuant to a stipulation for their benefit and protection in the contract with him. At the time the remittance was made, it was not, nor were the conditions and restrictions as to payment, purely voluntary; the payment of the funds into the bank was made at the time, by the method, and upon the terms theretofore agreed upon between the vendor, Miller, and the Scottish purchasers, Nimmo and Mitchell; hence the deposit and its accompanying directions as to disbusement were in discharge of obligations and

in performance of duties owing by the Scottish purchasers to their vendor. The contract pursuant to which this special deposit was made, having been entered into between Nimmo and Mitchell on the one part, and Miller on the other, manifestly was completely under their control, and could have been modified or annulled by their joint action at any time before other persons in some way parted with value or altered their rights in reliance upon its provisions. During the time the contract thus made remained revocable and under the control of the parties to it, obviously the plaintiffs acquired no rights under it, and even after the deposit had been made with the bank in fulfillment of the agreement we think there can be no doubt of the right of the parties to it by joint action to cancel the agreement, recall the deposit, and successfully demand of the bank the return to them of the funds.

While we have thus briefly considered the rights of the respective parties as to the contract between Nimmo and Mitchell and Miller and the funds to be paid into the bank pursuant to it, and have decided that neither the bank nor the plaintiffs had any vested rights concerning either, and that the parties to the contract had complete control of it and of the funds remitted under it, we cannot ignore the fact that the contract was not modified or annulled and the funds were not recalled. Under these circumstances and in the light of the relation of the respective parties and persons to the funds, what was the legal force and effect of the seventh paragraph, which was not modified or annulled and subject to the terms and conditions of which the special deposit was made? When the funds were accepted by the bank, its cashier received a copy of the written contract, and this constituted the sole source of the bank's authority touching the disposition of the funds; the contract provided that the money should be forwarded to the bank and how it should be applied by the bank. In so far as the contract related to the funds, its purpose was to give specific directions by the depositors as to the disbusements to be made by the bank out of the funds thus deposited. The restrictions and direc-

tions could have been changed by the parties to the contract under the terms of which the deposit was made; but the restrictions and directions were not changed and therefore the bank had no authority to make any payments out of the funds other than those directed to be made by the seventh paragraph of the contract. It must be remembered that the funds belonged to the parties (or, to speak more accurately, to the Diamond Hill Gold Mines, Limited, as general owner, Miller having a special interest) to the written contract containing the limitations upon the bank's powers, and hence these limitations must be understood to be limitations of the bank's authority as between the bank and the depositing owners. The bank had powers concerning the funds because the depositors conferred it, and that power was limited because the depositors limited it; any violation of the limitations would have been a violation of the duty the bank owed to the owners of the funds. If the funds were not disposed of as directed by the owners and depositors, they may complain of such a violation of their directions and such a misapplication of their funds; but so long as the funds remained subject to the control or even to the recall of the depositing owners, it cannot correctly be said that the bank owed to other persons a duty concerning the funds. Its authority and justification for paying any part of the funds to the plaintiffs must be found in the directions of the depositing owners; if it failed to make any payments directed by them it has disobeyed their instructions and if they were injured thereby a liability to them may have arisen. If, on the other hand, the bank has made payments which were not authorized by the depositors, it might find difficulty in legally accounting for the funds intrusted to it by claiming credit for such unauthorized disbursements. The bank received on deposit from the Scottish purchasers a large sum of money with instructions to pay therefrom whatever amounts were owing from Miller to the plaintiffs for the unpaid purchase price of certain mining claims. To one of the plaintiffs the bank paid $15,000 and to the other $7,000. These payments were expressly authorized,

but they did not exhaust the bank's power; it was authorized and directed by the depositors to make further payments to the plaintiffs, but it failed to obey the direction. The contention is that the bank not only had authority to make further payments to the plaintiffs, but that its duty was to exercise the authority and make such payments; that, by the acceptance of the deposit upon the terms expressed in the contract the bank impliedly promised the parties thereto that it would make to the plaintiffs all the payments authorized, and that such promise is enforceable by the plaintiffs as one made for their benefit.

For the purpose of testing the soundness of this contention we inquire when the supposed duty of the bank to the plaintiffs arose, when its supposed promise was implied, when the plaintiffs' supposed rights matured, and when the depositing owners of the funds lost all rights to, interest in, and control over the funds thus specially deposited? If after the funds had been deposited pursuant to the terms of the contract and before any payment had been made by the bank, all of the parties to the contract had rescinded it, notified the bank of the rescision, and demanded the return of the funds, could the bank have successfully refused to comply with the demand upon the ground that while such revocation might have been effective at any time before the deposit was actually made, yet the moment the bank accepted the money it impliedly assumed obligations to the plaintiffs of which the depositors could not relieve it? When A. furnishes funds to B. and directs him to pay them to C. to whom A. is not obliged to pay them and to whom he owes no legal duty in that regard, is such authority irrevocable or may it be recalled at any time before the power is exercised by making payment? These questions answer themselves. The sole source of the bank's authority was the provision contained in the seventh paragraph of the contract, and by accepting the deposit the bank impliedly promised not to make any payments except such as the depositors authorized, and if the payments agreed to be made and therefore authorized and directed had been afterwards forbidden by the unanimous action

of those under whose authority the bank was holding the money, plainly the bank could not properly have continued to act under the revoked power previously conferred.

The plaintiffs are not asserting in a suit against Nimmo and Mitchell, or the Diamond Hill Gold Mines, Limited, the Scottish purchasers, that the latter promised Miller to pay his debts to the plaintiffs. The actions rest upon the theory that the bank made an implied promise to Nimmo and Mitchell to pay to the plaintiffs the amounts of Miller's debts to them, and it is contended that this promise is to be implied from the mere acceptance of the funds from the Scottish purchasers with directions to pay the plaintiffs therefrom, and that such promise was a contract made expressly for the benefit of the plaintiffs. It is further contended, as has already been observed, that the receipt of the deposit created a voluntary trust of which Nimmo and Mitchell (or the Diamond Hill Gold Mines, Limited) were trustors, the defendant bank trustee, and the plaintiffs beneficiaries. It is not suggested that Miller was trustor. Section 2951 of the Civil Code defines a voluntary trust as an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another. Section 2953 of the same Code declares that "the person whose confidence creates the trust is called the trustor; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary." Section 2956 declares that "a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty, * an intention on the part of the trustor to create a trust." Counsel have failed to cite any well-considered case involving the application of legal principles to facts similar to those here presented in which either contention has been approved by a court of last resort; nor do we think the principles of law or the doctrines of equity countenance either position. In so far as they are applicable to the facts of the case at bar, the fundamental principles in the light of which Section 2103, *supra,* should be interpreted

may be thus illustrated: An executed contract does not require a consideration to support it. For example, a gift consummated is an executed contract. But a contract of gift the subject of which is not delivered is without consideration—a mere *nudum pactum*—and therefore not enforceable by the donee. The provisions of section 2103 do not embrace gifts not perfected or other executory contracts lacking consideration. It should seem to be manifest that the legislature did not intend to declare that an executory contract in which there is a promise to make a gift to or to confer a gratuity upon a third person may be enforced by him. To come within the meaning and scope of the section, the (executory) contract made expressly for the benefit of a third person must be one whereby the promisor undertakes to pay or discharge some debt or duty which the promisee owes to the third person,—in other words, the third person must sustain such a relation to the contracting parties that a consideration may be deemed to have passed from him to the promisee which raises the implication of a promise from the promisor directly to himself. There must be a consideration passing from the third person by virtue of which he may assert the existence of a promise in his favor. We do not attempt to interpret the section further than the facts in this case seem to require. The evidence does not indicate to any extent whatever that the contract between Nimmo and Mitchell and Miller was made expressly for the benefit of the plaintiffs, however much they might have been incidentally benefited by the performance of all of its terms. There is nothing tending to show that either Nimmo and Mitchell (who contracted with Miller) or the Diamond Hill Gold Mines, Limited (which remitted the funds pursuant to the contract) owed any duty to the plaintiffs or intended to create a trust for their benefit. On the contrary, the provision of the contract as to payments was entirely for the benefit and protection of the parties to it and their successors, created no rights in persons not parties to it, and was revocable at pleasure by those who had (at least so far as the plaintiffs are concerned) voluntarily entered into it.

We do not assent to the doctrine that such a special deposit subject to recall, or such revocable directions for the payment of money, creates implied contract obligations towards the persons to whom the payments were directed to be made.

We are of the opinion, therefore, that although the bank was authorized to pay to the plaintiffs more of the funds than it did pay to them, it was under no legal obligation to the plaintiffs to make such payments; that whatever obligations it impliedly assumed towards the funds were obligations to the depositors and not to the plaintiffs, and the limited obligations thus assumed were not obligations to pay the plaintiffs but, rather not to pay Miller until the unpaid purchase price due from him to them had first been liquidated;—and hence it was not liable to the plaintiffs to whom it might have made but did not make payments. Entertaining these views, we perceive no reason for considering the relative rights of trustees and beneficiaries which have been so fully and exhaustively discussed by counsel. Under the pleadings and proof we think it clear that so far as the plaintiffs are concerned the law relating to trusts is without pertinency.

The evidence did not tend to prove that the defendant bank received to or for the use of either plaintiff any money from Nimmo and Mitchell or the Diamond Hill Gold Mines, Limited. The allegations of the complaints were not sustained by the proofs, and hence the plaintiffs failed to make a case. Irrespective, therefore, of the effect of the orders given by the plaintiffs to the bank, the plaintiffs were not entitled to recover in actions for moneys received by the defendant from Nimmo and Mitchell to their use.

The orders and judgments appealed from are reversed and the causes are remanded with directions to grant new trials.

Reversed and remanded.

Rehearing denied July 31, 1901.

HELENA & LIVINGSTON SMELTING & REDUCTION COMPANY, Appellant, v. LYNCH ET AL., Respondents.

(No. 1,345.)

(Submitted May 17. 1901. Decided July 22, 1901.)

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Mines and Mining—Ditches and Flumes—Right of Way—Condemnation Proceedings — Instructions — Damages — Verdict.

1. Where, in a proceeding to condemn a right of way, plaintiff alleges title in defendant, a contention that the verdict for damages was not supported by the evidence, because there was no evidence that defendant's title was valid, cannot be considered.
2. In a proceeding to condemn a right of way, the verdict assessing the damages will not be set aside, the evidence being conflicting, and there being sufficient to support the verdict.
3. The fact that the jury found the land taken in condemnation proceedings of greater value than that fixed by the commissioners, and the incidental damages to be $1,100, whereas the commissioners adjudged there were none, does not indicate that the jury were influenced by passion and prejudice justifying interference with the verdict.
4. Under Code of Civil Procedure, Sec. 1080, Subd. 7, requiring a party desiring special instructions to reduce them to writing, and to request the court to so instruct, alleged errors in omitting to charge on certain points will not be considered in the absence of such a request.
5. In condemnation proceedings for a right of way over mining claims, it was not necessary for the court—at least in the absence of a specific request therefor—to define the word "prospect," as used in an instruction, since the term is well understood in all mining districts in the West.
6. In condemnation proceedings for a right of way for a ditch and flume over mining claims, an instruction, contrary to Civil Code, Secs. 1897-1899, that the right of defendant to the use of any water in the ditch was dependent on an agreement between the parties, was harmless error where there was no evidence to which the instructions could apply.

Appeal from District Court, Jefferson County; M. H. Parker, Judge.

Proceeding by the Helena & Livingston Smelting & Reduction Company against John Lynch and another to condemn a right of way for a ditch and flume. From the judgment assessing the damages, the plaintiff appeals. Affirmed.

Messrs. Cullen, Day & Cullen, for Appellant.

Messrs. McHatton & Cotter, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

Proceeding to condemn a right of way for a ditch and flume over the Pine Tree and Katie Lynch lode claims, situate in Jefferson county. The extent of the area sought to be appropriated is a strip of land 4 feet in width and 1,421.6 feet in length upon the Pine Tree lode, and 777.5 feet in length upon the Katie Lynch lode. In the order of condemnation the district court appointed three commissioners to appraise the value of the land taken, and to assess the damages. After duly qualifying, the commissioners inspected the premises, heard the allegations and evidence of the parties, and thereupon reported in writing their findings, fixing the value of the way over both claims at $200, and declaring that there were no incidental damages. The defendants, being dissatisfied with the award, appealed to the district court, under the provisions of Section 2224 of the Code of Civil Procedure, and thereafter, upon a trial in the court, a verdict was returned in their favor, fixing the value of the way over the Katie Lynch lode at $100, with incidental damages of $300, and over the Pine Tree lode at $150, with incidental damages of $800. The jury further found that neither of the claims would be benefited by the ditch and flume. From the judgment entered upon the verdict, and from an order denying a new trial, plaintiff has appealed.

1. Counsel for plaintiff have entered into an elaborate argument to demonstrate that the evidence is insufficient to justify a verdict for more than nominal damages. They insist, first, that there is no evidence that the title of defendants is founded upon valid locations under the laws of the United States. The title of the claims was not an issue in the case. In order to maintain this proceeding at all, it was incumbent upon the plaintiff to allege and show title in defendants. Acting upon this theory, and in order to give the district court jurisdiction to entertain its application, the plaintiff alleged in its complaint that defendants were the owners of the claims, and that

they had refused to come to an agreement with it by which it might acquire the proposed right of way by the payment of adequate compensation. Defendants, admitting their ownership and that plaintiff was entitled to a right of way, contested the amount of damages only. Therefore an inquiry into the validity of the title would have been wholly foreign to the issue before the court, and would have shed no light upon the question of value. In the second place, counsel insist that the evidence fails to show that the claims have any value by reason of mineral deposits actually shown to exist therein sufficient in quantity and quality to warrant the expenditure of time and capital in their development. It is true, the evidence discloses that the claims were, when this proceeding was begun, mere prospects, without sufficient development to have more than a speculative value; nevertheless, their condition was fully shown to the jury, and there was some evidence from which the jury were warranted in finding that they were of sufficient apparent value to justify further development. The evidence further tended to show that the points at which this work could be done most cheaply and conveniently were at the points of discovery, and that the permanent location of the flume and ditch upon the claims would entail much additional cost and inconvenience in the prosecution of development work. The only value a newly-located mining claim has is usually prospective. No person can look beneath the surface and tell its worth; nor can he say from a superficial examination that it is or is not of value. In determining what is its value, its situation and surroundings must be taken into account, and from these, in connection with what actually appears in the superficial openings or outcroppings of mineral-bearing rock upon the surface with the opinions of those experienced in mining, a conclusion must be reached. This was the theory of the defendants in the trial of this case, and, though there was a sharp conflict in the statements of fact and opinions of the various witnesses, we would not feel justified in saying that the jury were wrong in finding as they did. This statement is especially applicable to the amounts fixed by

the jury as incidental damages. There was a great deal of evidence upon the subject of the additional expense which the defendants would have to bear in order to protect the ditch and flume from injury during exploration. The owners of such claims are entitled to work them according to what, in their own judgment, and that of other experienced miners, is the cheapest and most approved plan, and thus to demonstrate whether or not a mine in fact exists therein. An interference with this plan by the appropriation of a right of way, or the imposition of any other servitude upon the claim, may or may not, according to circumstances, cast an additional burden of expense upon the owner, which may be considered by the jury in awarding damages. In this connection the jury found that the additional burden cast upon the defendants by the presence of the flume and ditch upon their property amounted to the sums fixed by them as incidental damages. While, under the evidence, the total amount might have been much smaller, or even nothing, yet it also might have been found to be much larger. That this Court has no power to interfere in such a case is too well settled to require a citation of authorities.

2. It is said by counsel that, though the conclusion may be justified, upon the whole of the evidence, that defendants are entitled to some compensation, the amount fixed by the jury is so grossly in excess of what was awarded as a fair amount by the commissioners, and shown by the evidence to be fair and just, that the jury must have been influenced by passion and prejudice. What we have already said disposes of this contention. While it is true that the jury found the value of the land taken greater than that fixed by the commissioners, and the incidental damages to be $1,100, whereas the commissioners found none, nevertheless the judgment of the commissioners was not the standard by which the jury were to be governed, but the evidence submitted at the trial. The fact that the latter found the land of a greater value than did the former, and that there were incidental damages, though the former judged that there were none, does not of itself indicate passion and preju-

dice, but may fairly be taken as an indication that the latter had before them facts for consideration which were not brought to the attention of the commissioners, or considered by them.

Courts are reluctant to interfere with the verdict of a jury, and will not do so, on the ground of excessive damages given under the influence of passion and prejudice, unless it is apparent that their feelings of passion and prejudice have entered into and influenced their decision. Where it is apparent that this is the case, a new trial should be granted, unless it is also apparent that the verdict is otherwise correct, and the ends of justice will be fully served by requiring the successful party to remit the excess. In the latter case, however, it should appear that upon the facts the successful party is clearly, and as a matter of law, entitled to a verdict in some amount, and that the prejudice and passion of the jury have gone no further than to lead them to swell the amount of damages; otherwise, all their deliberations must be deemed to have been permeated by their feelings, and the decision as a whole the result of passion, rather than of their calm, deliberate judgment. There is, as we have seen, evidence to support the findings of the jury of incidental damages in substantial, instead of merely nominal, sums, and under it these sums might have been greater. The findings may, therefore, fairly be said to be within the purview of the evidence, and not founded upon extrinsic considerations. Under these conditions we do not feel that we should adopt a different view from that entertained by the district court in overruling the motion for a new trial on the ground in question.

3. Counsel criticise the instructions submitted to the jury in several particulars,—among others, in that the court omitted to tell them that the value of the area taken for the way was dependent upon the actual value of the claims as mining claims, the evidence showing that they had no value for other purposes; in that it failed to submit to them the question whether the claims were of sufficient value to "warrant a prudent person in expending money thereon with a reasonable expectation of developing" valuable mines therein; and in that special instruc-

tions were not submitted on these points touching the Katie Lynch claim, and also upon the question whether the defendants expected to develop it.

The evidence was all directed toward an effort to show the value of the claims as mining claims, and not for any other purpose, and it was made apparent thereby that, if the claims had any value whatever, it was dependent upon the probability that upon development they would prove of value as mines. The court submitted instructions generally informing the jury how to proceed in order to find the amount of compensation to which the defendants might be entitled under the proof. Though they were not told in terms that, if the claims had no value as mining claims, the damages should be fixed at a nominal sum only, they could not possibly have been misled to adopt any standard of value other than the one plaintiff contends should have guided them. They were told distinctly that the "actual value of the property sought to be appropriated" should be the measure of compensation for all property taken, and this standard they were clearly told should be applied to each claim. Under the statute in this state applicable to civil cases (Code Civ. Proc. Sec. 1080, Subd. 9; Acts 1897, p. 241), the court is required to instruct the jury in all matters of law which it thinks necessary for their information in rendering a verdict. Under subdivision 7 of the same section, the party desiring special instructions upon any particular subject must reduce them to writing, and deliver them to the court with a request that they be given. Unless this be done, the losing party will not be heard to complain that the instructions are not sufficiently specific, provided the court has correctly stated the law applicable to the facts of the case. (Hayne, New Trial, 120; *State* v. *Broadbent,* 19 Mont. 467, 48 Pac. 775; *Territory* v. *Manton,* 8 Mont. 108, 19 Pac. 387; *Mulligan* v. *Montana Union Railway Co.,* 19 Mont. 135, 47 Pac. 795; 2 Thomp. Trials, 2341.) So far as the record advises us, the plaintiff did not request specific instructions in the particulars mentioned. It therefore cannot complain that the trial court did not more fully state the law.

It is said by counsel that the court erred in failing to inform the jury as to what is necessary to be done in order to make a valid location of mining claims, and also in failing to define for them the word "prospect," as used in one paragraph of the instructions. What has already been said as to the other criticisms applies with equal force to these. Furthermore, the validity of the locations under which defendants claim did not and does not arise in this case. What has been said in the first paragraph of this opinion disposes of this contention. It may also be said that it was not necessary for the court—at least in the absence of a specific request therefor—to define the word "prospect." This is a term the signification of which is well understood in all the mining districts of the West, and the trial court was justified in assuming that the jury understood it without specific definition.

In paragraph 9 of the instructions the court told the jury "that, under the law, defendants will not have the right to use the water flowing in the ditch or flume across the claims belonging to plaintiff without an agreement or understanding with plaintiff concerning the use of the same, and the evidence does not disclose that such agreement or arrangement can be made." It is said that this instruction is prejudicially erroneous, in that under the statute (Civil Code, Secs. 1897-1899) the defendants have the right to the use of any surplus water which the plaintiff may have in its ditch or flume, independently of any contract therefor, and that under these provisions the plaintiff had the right to have submitted to the jury the question whether the construction of the ditch and flume upon the claims would prove of benefit to them, by furnishing a convenient source of water supply, of which defendants could avail themselves in prosecuting the work of development. The instruction is erroneous in saying that the right of defendants to the use of any water was dependent upon an agreement between them and plaintiff. Under the statute, *supra,* if the plaintiff should at any time have surplus water, and the defendants should desire to use it, they could avail themselves of it, even over the objec-

tion of plaintiff, by a compliance with the terms of the statute. There was no evidence before the court, however, to which the instruction could apply. It was not shown that the plaintiff at the time of the trial had, or ever would have, any surplus water available for defendants' use, by contract or otherwise. The jury, therefore, could not have found that the flume and ditch would, for the reason stated, be of any benefit to the defendants' property. For this reason the instruction should not have been given, but, under the evidence submitted, no harm could result from the exclusion of the whole matter from the consideration of the jury, which, in effect, the instruction complained of does.

The judgment and order appealed from are affirmed.

Affirmed.

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STATE EX REL. ANACONDA COPPER MINING CO. ET AL., RELATORS, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

(No. 1,682.)

(Submitted June 3, 1901. Decided August 1, 1901.)

Mines and Mining—Mining Claim—Location—Surface Rights—Common Law Rights—Supreme Court—Jurisdiction—Supervisory Control—Writ of Supervisory Control—Mandamus—Certiorari.

1. Relators were the owners of patented claims Anaconda, St. Lawrence, Smoke Stack and Rob Roy, and subsequently defendant located the Copper Trust mine on a discovery near the eastern corners of the Smoke Stack

and St. Lawrence, alleging that the vein there discovered passed on its strike through the Smoke Stack, the St. Lawrence and into the Anaconda. Defendant's claim was so located as to include within its lines most of the space included within the Smoke Stack and St. Lawrence, and also a space to the southwest of these claims and to the east of the Anaconda not included in the surface rights of the three claims through which the vein passed, nor subject to their extralateral rights, but which was within the surface of the Rob Roy. Defendant did not claim any right to follow the vein to such space, but that it belonged to him by appropriation. *Held,* that the ores in such space belonged *prima facie* to the relators, as owners of the Rob Roy, by virtue of comon-law rights, though no part of the apex was within its bounds, and therefore it was error, in an action by the defendant against the relators for removing ores from such space, to grant him an order for the inspection of relators' mines, under Code of Civil Procedure, Secs. 1314, 1315, providing that such order may be made "for good cause shown" pending an action for the recovery of a mine.

2. *Quaere*: Whether a valid location can be made by a trespass upon the surface of lands to which patent has already been issued.

3. The owner of a mining claim holds everything beneath the surface, subject only to the right of an adjoining locator or patentee, who has the apex of a vein and who has complied with the statute, to pursue it on its dip beneath the surface.

4. Constitution, Art. VIII, Secs. 2, 3, give the supreme court general supervisory control over other courts, under such regulations as may be prescribed by law, and confers power to issue and hear writs of *mandamus,* etc., and such other original and remedial writs as may be necessary to the exercise of its appellate jurisdiction. Code of Civil Procedure, Sec. 205, declares that, when jurisdiction is conferred on a court, and the course of proceeding is not specifically pointed out, any suitable process conformable to the spirit of the Code may be adopted. *Held,* that the power of supervisory control was a distinct power, and might be exercised to control the discretion of an inferior court in making an order from which no appeal would lie, and for which the writs appertaining to the appellate jurisdiction furnished no remedy.

5. Where defendant sued relators, alleging that they were removing ore from certain premises the right to which was in defendant, but the evidence showed the the *prima facie* right was in relators, an order granting defendant and his employees right to enter and inspect all of relators' surrounding mines for the period of 40 days for the purpose of obtaining evidence, being an order not appealable nor subject to control by any of the specified writs within the jurisdiction of the court, it was a proper case for the court to exercise the power of "supervisory control" over the inferior court, conferred by Constitution, Art. VIII, Sec. 2.

6. By *mandamus* the supreme court may coerce into activity, but it may not be used to control discretion or to correct errors.

7. By *certiorari* an order made without or in excess of jurisdiction may be annulled or modified when there is no appeal or other adequate remedy; but it cannot be used to correct errors of judgment in the exercise of jurisdiction.

Application by the state, on the relation of the Anaconda Copper Mining Company and another, for a writ of supervisory control directing the judge of the district court of the

Second judicial district of Silver Bow county and another to reverse an order issued in proceedings therein. Writ issued.

Mr. W. W. Dixon, Mr. A. J. Shores, Mr. D. Gay Stivers, Mr. C. F. Kelly and *Mr. J. K. MacDonald,* for Relators.

Messrs. Toole & Bach, Messrs. McHatton & Cotter, Mr. J. M. Denny and *Messrs. Cullen, Day & Cullen,* for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

On December 20, 1899, one Burdette O'Connor brought an action in the district court of Silver Bow county against the Anaconda Copper Mining Company and the Washoe Copper company, corporations, the relators herein, alleging that he was the owner of the Copper Trust lode claim, situate in Silver Bow county, and that the defendants had theretofore trespassed upon his rights therein by entering within its boundaries, and extracting and carrying away ores therefrom to the value of $2,000,000, to his damage in that amount. Under a separate cause of action incidental relief was sought by way of injunction. The cause is still pending in the district court, the issues therein not having been made up at the time the present controversy arose. On March 26, 1901, for the purpose of obtaining evidence to aid him in the trial of said cause, the said O'Connor filed therein a petition asking the court for an order permitting him to inspect and survey all the underground workings in the Anaconda, St. Lawrence, Never Sweat, Rob Roy, Grant, Grant Extension, Parrott, Lot 45 C, and the Cuerpo Bazzo lode claim, and also in the Leggatt and Foster placer claim, all of which the complaint alleges are in possession of defendants, or one of them, and through which defendants had entered upon the ore bodies belonging to the Copper Trust, and committed the trespasses complained of. The situation of the ore bodies in controversy, as shown by the evidence submitted

to the court at the hearing, and the respective claims of the contending parties, will be readily understood from the subjoined diagram:

The exterior boundaries of the Copper Trust lode are indicated by the heavy lines. This claim overlies the Smoke Stack lode, and most of the surface of the St. Lawrence. It will be noted that all of the claims mentioned, both the Copper Trust and those belonging to the relators, have parallel end lines.

All of the claims belonging to relators are held by patents issued at various times up to and including November 2, 1892, when the patent to the Cuerpo Bazzo claim was issued. It will also be noted that some of the boundary lines of the Smoke Stack claim, as originally located, were laid upon and over the surface included within the lines of the Mountain View and Fairmount, to the north. The patent to the former excludes the conflicting surface. It is admitted by the parties that all of the surface to the south and southwest of the Smoke Stack claim is covered by the patents of relators. The Copper Trust is an unpatented claim. It was located on April 30, 1899, by virtue of an alleged discovery made on that date in the small triangle, then vacant, which is indicated by the letters A, B, 10 feet in width at the base and extending east between the lines of the Johnstown and Mountain View to its apex, a distance of 75 feet. The only other ground embraced within the limits of the Copper Trust not covered by the relators' patents is a small triangle at the point C, between the east end line of the Mountain View and a claim known as the Sullivan, lying immediately to the east. It does not appear whether there is any apex within the exterior boundaries of the triangle last mentioned. The contention made by O'Connor was and is that the vein thus discovered in the first triangle mentioned dips to the south at an angle of about 70 degrees, and passes on its strike through the base of the triangle into the Smoke Stack claim, thence across its south side line into the St. Lawrence, and thence into the Anaconda claim across the west end line of the former at the point D, about 150 feet north of the intersection of this line with the east end line of the latter at the point G. The course of it, under this contention, is indicated approximately by the position of the letters B, A, E, D. O'Connor further contends that under the Copper Trust location he is entitled not only to the surface within his boundaries not covered by the relators' patents, but also to all portions of the lead having their apex therein, as well as to those parts of it which, though they have no apex within his surface, are so

situated with reference to the end lines of relators' claims that the relators may not assert title to them by virtue of their extralateral rights. In other words, it is asserted that the relators have no extralateral rights upon this vein, either through the Anaconda or the St. Lawrence, south of the intersection of the end lines of these claims at G, and within the triangular portion of the earth included between the vertical planes passing downward through these lines extended in their own direction indefinitely toward the south. He contends, therefore, that, inasmuch as the relators, in making their locations, did not so lay their lines with reference to the strike of the vein that they could follow it on its dip into this portion of the earth by virtue of their extralateral rights, they failed to appropriate it at all; that it was thus left to be appropriated by any other claimant; and that it belongs to the plaintiff under his location. The position of the relators is that, though they do not have title to the ores in the ground in question by virtue of extralateral rights through the St. Lawrence and the Anaconda, they nevertheless own them, as against O'Connor, at least, by virtue of their common-law rights to the surface and everything beneath, because neither O'Connor nor any one else owns any part of the apex of the vein, which is so situated that extralateral rights through such portion may be asserted to anything beneath the surface owned by them. Therefore, they say, O'Connor has shown no right to any part of the ores in controversy such as to authorize the court to grant an order permitting him to make the inspection and survey sought.

Upon the facts presented, the court overruled the contention of the relators, and granted the order as prayed. Under it O'Connor was granted the right to enter into any or all the underground workings in all the claims mentioned belonging to the relators to the south and west of the Smoke Stack claim for the period of 40 days; to employ six engineers and assistants to conduct the work of survey and inspection; and to demand, at reasonable times, of the relators, that he and his said engineers and assistants be lowered into the mines and hoisted

therefrom to the surface whenever he and they should require the same to be done.

The relators, by a verified petition setting forth all the proceedings, including the pleadings in the cause, and all the evidence submitted by the parties, and alleging that O'Connor had not brought his action or made his application to the district court in good faith, applied to this court for relief, asking that this court issue a writ, under its constitutional powers of supervisory control over the inferior courts of the state, directing the district court and its judge to set aside and vacate the order, and to deny the application for an inspection and survey.

The theory of the relators is that upon the facts the district court abused its discretion, and acted arbitrarily, and in plain violation of the legal rights of the relators, in granting the order, and that they are without redress by any other means known to the law.

Under an order to show cause, issued by this court, the respondents appeared by filing an answer denying the charges of bad faith on the part of O'Connor, and also a motion to dismiss the application on several grounds. At the hearing three propositions were urged as conclusive reasons why this court should not interfere, namely: First, because, under our constitution, the power of supervisory control lodged in this court is not self-executing, and the legislative branch of the state government is alone vested with the power to prescribe regulations and limitations under which it may be exercised; second, because the legislature has done so by adopting the only writs allowed by the constitution, except in appellate matters, and because this court is limited to the use of them as thus defined; and, third, because, if, under our constitution, the powers of this court can possibly extend the operation of these writs, or any of them, beyond the limits prescribed by law, no such grave emergency exists in this case as would justify it in thus using any of them.

From an analysis of these propositions it appears that two,

and only two, questions are presented for decision, namely: Was the action of the district court in granting the order erroneous? and: Can this court afford relief, and, if so, what is the proper remedy? We shall consider these in their order, and, incidentally, also the further question whether, if the order is found to have been erroneous, the circumstances present such a case as will justify this court in using any remedy which it may deem available.

Sections 1314 and 1315 of the Code of Civil Procedure, under which the order was made, provide:

"Sec. 1314. The court in which an action is pending for the recovery of real property or mining claims, or for damages for an injury or to quiet title or to determine adverse claims thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter into or upon the property or mining claim, and make survey or measurement thereof, or of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands or mining claims belonging to parties to the action.

"Sec. 1315. The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter the property, with necessary surveyors and assistants, and make such survey and measurement; but if unnecessary damage be done to the property, he is liable therefor."

The purpose of these sections, and a similar provision, found in Section 1317, which, by its terms, seems to apply to cases where no action is pending, but contemplated only, is to enable either of the parties to a controversy over real property, when it is in the possession of his adversary, upon showing that the circumstances of the case require it, to have an examination and survey of it, to the end that he may be put in possession of all the facts touching the controversy, and thus to furnish them to the court, so that the respective rights of the parties

may be properly determined. So wholesome and necessary are the means thus afforded litigants to properly present their rights to the tribunal administering upon them, that it is not surprising to find that these inspection orders have often been made by the courts, both in this country and in England, even in the absence of special statutory authority, under their general powers as courts of equity. An inquiry into the origin and purpose of the rule embodied into the statute, with citation and examination of American and English cases, will be found in *St. Louis Min. & Mill. Co.* v. *Montana Co.*, 9 Mont. 288, 23 Pac. 510, and in the same case, affirmed on writ of error by the Supreme Court of the United States, in 152 U. S. 160, 4 Sup. Ct. 506, 38 L. Ed. 398. The sections of the statute go no further than to declare the rule as it has existed for many years, except that by their terms they extend the rule to all courts, whether sitting as courts of law or equity. It is not our present purpose, however, to discuss the propriety of the legislation. We refer to the statute, and the cases in which the rule has been applied, to show that the district court had ample authority to make the order in question, provided the facts presented at the hearing justified it. Indeed, the order, upon proper showing, is always made almost as a matter of course. The purpose of the statute is to serve the interests of justice, however, and not to be made an instrument of injustice or oppression. Under it the court may not, without a reasonable showing, and in disregard of the rights of the party in possession of the property, or in control of the means of access to it, permit his adversary to enter upon it, merely because he desires and asks for an order permitting him to do so. The law must be administered in the spirit of liberality to accomplish the desired end. Purely technical and captious objections should not be tolerated. The language of the statute is, "for good cause shown," and, under the rule laid down in *St. Louis Min. & Mill. Co.* v. *Monatna Co., supra,* whenever the order is made without good cause, it must follow that it is an infringement on the rights of the party in possession, and may be set aside

as unauthorized; otherwise, the power of the court could be exercised without restraint, and to the great injury and oppression of the party in possession.

With these preliminary observations we proceed to determine, from a consideration of the facts presented to the district court, whether the order complained of was justified. O'Connor does not assert title to any other surface within the boundaries of the Copper Trust claim than the two triangles already mentioned. It is not controverted in this proceeding that the relators are entitled, under their patent, to so much of the vein found within the surface of the triangle A, B, as passes on its strike through the Smoke Stack, the St. Lawrence, and the Anaconda claims, and that in following this vein on its strike to the southwest O'Connor cannot pass beyond the east end line of the Smoke Stack. Indeed, this is apparent from an inspection of the plat. The parallelism of the end lines of the Smoke Stack and St. Lawrence also gives to the relators the right to follow the vein to the south on its dip beyond the vertical planes of the side lines of these claims. Under the Smoke Stack claim the extralateral rights are bounded by the vertical plane of the east end line of the Smoke Stack and St. Lawrence and a parallel vertical plane passing through the point at which the vein crosses the south line of the Smoke Stack into the St. Lawrence. The extralateral rights of the St. Lawrence are bounded by the vertical plane last mentioned and a vertical plane passing downward through the west end line of this claim, for it appears from an inspection of the plat that the area of the surface conflict between the Anaconda and the St. Lawrence belongs to the St. Lawrence claim. It follows, further, as a necessary conclusion, that, so far as O'Connor has any right to follow this vein on its dip from that portion of the apex found within the boundaries of the triangle A, B, this right is limited toward the west by the vertical plane of the east end line of the Smoke Stack and of the St. Lawrence, extended in its own direction. The situation presented by the position and course of the apex, with reference to the lines of

these claims and the rights dependent thereon, have been considered and determined by the following cases: *Fitzgerald* v. *Clark*, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, 52 Am. St. Rep. 665; *Del Monte Min. & Mill. Co.* v. *Last Chance Min. & Mill. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; *Clark* v. *Fitzgerald*, 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87; and *Parrot Silver & Copper Co.* v. *Heinze*, 25 Mont. 139, 64 Pac. 326; and all questions arising thereon are now too well settled to admit of further discussion. It is of no moment to inquire what are the extralateral rights of the relators through the Anaconda claim. No part of the surface of that claim is embraced within the boundaries of the Copper Trust, and therefore we shall not stop to consider them, except to remark that, whatever rights the relators have to follow the vein on its dip from the point where the apex passes into that claim, they cannot extend further east than the vertical plane of its east end line. Stated succinctly, the question to be determined is: What right, if any, has O'Connor, by virtue of the Copper Trust location, to assert title to the ores lying underneath the earth within the triangle the apex of which is at G? He does not contend that he has any right to follow the vein from the part of the apex within the triangle A, B, through the intervening space, about 1,300 feet, either on or beneath the surface of the St. Lawrence. As we have already stated, his claim is that, as no part of the ore bodies in controversy is situated within the surface boundaries of the St. Lawrence claim, no part of them belongs to that claim, and, as the relators may not claim this portion of the vein through the St. Lawrence or the Anaconda by means of their extralateral rights, they were not, in contemplation of the mining laws, appropriated by the relators through any of their locations, and therefore belong to O'Connor by appropriation under the Copper Trust, although he has no part of the apex by which he may follow the vein on its dip from the surface. In support of his contention, counsel for respondents cite the *Del Monte Case, supra,* as decisive. We do not so understand it. Among other questions decided in

that case it was distinctly held that any of the lines of a junior location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location. The question presented here did not arise, and was not decided. Referring to the diagram used to illustrate the contentions of the parties and the different directions of the lines pointed out in the opinion, it appears that upon an extension of the vertical plane of the north end line of the New York claim in its own direction a triangular portion of the vein would be left between it and the vertical plane of the line bounding the extralateral rights of the Last Chance to the south, entirely beyond the vertical plane of the surface lines of any of the conflicting claims. The court says, with reference to the title to this portion of the vein: "In other words, referring to the first diagram, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line r, s, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line e, h, the end line of the New York claim, extended downward into the earth, will at a certain distance pass to the south of the line r, s, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, b, c, extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line a, d, t, and the line r, s, and to

appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration." The court does say, as defendants claim, that the portion of the vein referred to does not pass to the owner of the New York. Obviously, this is a correct conclusion, for, under no circumstances, would the extralateral rights of the New York extend northward beyond the vertical plane of its north end line. With equal distinctness is the question of the rights of the Last Chance to any of that portion of the vein reserved. Nowhere in the opinion do we find any support for the contention that the junior locator acquires any right to any portion of a vein beneath the surface of the senior location by laying his lines upon, over, or across its surface, except that by this means he may secure parallelism of his end lines, and, through this parallelism, extralateral rights to the extent of the length of the vein found within the surface for which he may receive patent. We doubt seriously whether the court intended to be understood as declaring it to be the law that a junior locator may lay his lines, in part or wholly, upon and over the surface of claims already patented, and secure any rights thereby. After patent has issued, the legal title to the land conveyed by it has passed wholly from the government. The holder of this title is wholly beyond the jurisdiction of the land department; and it would seem that no one can initiate by trespass upon his tract any right whatever, whether it be committed ignorantly or not. It does not appear distinctly from the opinion in the *Del Monte Case* whether any of the claims were patented at the time the conflict arose. If the law is as counsel contend, then a patent does not convey an absolute estate, but only a qualified fee, and leaves the land still subject to some rights in the government,—a doctrine for which there seems to be no warrant in the statute. So long as land is not patented, the legal title is still in the government; and it may be argued with some force that, while held under

a location merely, it is still within the jurisdiction of the land department, and for that reason it is within the province of its authority to say that a junior locator may lawfully go upon it, and mark his boundaries and erect his monuments upon its surface, in order to initiate rights in lands not covered by it. This seems to be the theory upon which the court proceeds in the *Del Monte Case;* for the argument upon which its conclusion on this point in the case is based is found on pages 73-85, 171 U. S., pages 902-907, 18 Sup. Ct., and pages 80-84, 43 L. Ed., and nowhere therein do we find any reason stated which would apply with any force to locations made by a trespass upon the surface of lands to which patent had already been issued.

The only authority called to our attention which distinctly sustains the contention of counsel as to the validity of the Copper Trust location is the decision in *In Re Hidee Gold Min. Co.*, rendered by Secretary Hitchcock on January 30, 1901. In this decision the secretary distinctly sustains the contention of counsel for the defendants on this point. We quote from the headnote of his opinion: "The location lines of a lode mining claim are used only to describe, define and limit property rights in the claim, and may be laid within, upon or across the surface of patented lode mining claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins, where such lines (a) are established openly and peaceably, (b) do not embrace any larger area of surface, claimed and unclaimed, than the law permits." Even he limits the validity of such locations to cases where the lines are established openly and peaceably. We do not understand, however, how the United States government may convey any right to lands by consent of an adjoining owner under patent, which it could not convey without such consent. As we have said, we have grave doubts as to the soundness of the conclusion of Secretary Hitchcock. But conceding, for the present discussion, that it is the law,

there is nothing in the *Del Monte Case* nor in the opinion of the secretary to support the contention of counsel that O'Connor acquired by his location of the Copper Trust ownership of any part of the vein in question which underlies the Rob Roy claim, or any of the claims to the south. In the *Del Monte Case* the extralateral rights claimed by the Last Chance were asserted as to that portion of the vein the apex of which was found within that part of the surface of the Last Chance not covered by any previous location. The case goes only to the extent of deciding that, as the Last Chance had parallel end lines, and the vein passed through them, it had extralateral rights as to that portion of the apex not covered by either of the other conflicting locations. The *Hidee Case* involved only the validity of a location the lines of which were laid upon, over and across the surface of the claims already patented, so as to secure all the rights appertaining to the unappropriated intervening surface. Certain expressions found in these cases in which reference is made to underground rights would seem to lend support to the contention of counsel, but, when they are considered in the light of the particular rights under discussion, they have no pertinency to the question presented in this case. The same may be said of *Crown Point Mining Co.* v. *Buck*, 38 C. C. A. 278, 97 Fed. 462. Suppose, for instance, there had been no vacant surface within the boundaries of the Copper Trust location, would it be contended for a moment that O'Connor has any rights whatever under it? A discovery of a vein upon unoccupied land is absolutely essential to the validity of a location. There must be a surface right; without this no right to the lode can be established. The statutes do not authorize the land department to convey a lode independently of the surface ground connected with and containing or overlying it. This is the conclusion stated by this court in *Montana Ore Purchasing Co.* v. *Boston & M. Consol. Copper & Silver Min. Co.*, 20 Mont. 337, 51 Pac. 159, in a case in which the plaintiff claimed under a patent which attempted to convey a small portion of surface covered by the Rarus location, together with

1,318 linear feet of the lode, which had its apex in, and underlay the surface of, the Johnstown, a conflicting claim. The patent was held to be unauthorized and void as to the portion of the ledge not underlying the surface conveyed by it. This court said: "It is no doubt true that those statutes, taken as a whole, give greater prominence verbally to the lode or vein than to the surface connected therewith; but this naturally results from the fact that the lode is the main subject treated. Such expressions and such prominence, however, cannot avail to permit the grant of lodes or veins embraced in a located quartz claim, regardless of the surface connected therewith." The same view is stated by Mr. Lindley in his work on Mines in section 780. It is only by virtue of an apex found within the surface of any claim having parallel end lines that an owner may assert the right to enter beneath the surface of his neighbor. This is the evident meaning of Section 2322 of the United States statutes. Neither this section nor any other provision of the statute authorizes or provides a way for the appropriation of any portion of a lode without some portion of the surface through which it may be reached. Should a patent issue to O'Connor, under the *Del Monte* and *Hidee Cases* it would issue for the whole surface within the Copper Trust boundaries, excluding all those portions covered by the relators' patents. Under the principle of the case of *Montana Ore Purchasing Co.* v. *Boston & M. Consol. Copper & Silver Min. Co., supra,* and as stated by Mr. Lindley, this would *ipso facto* exclude the ore bodies lying within the disputed triangle. Again, the title to a mining claim carries with it all the rights incident to a title in fee at the common law, except in so far as it is enlarged or limited by the statute. This court, in *Parrot Silver & Copper Co.* v. *Heinze,* 25 Mont. 139, 64 Pac., at page 329, in considering such rights, said: "The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the

vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant. On the other hand, this grant is subject to the right of an adjoining locator to follow his vein upon its course downward beneath the surface included in the grant. In these two respects only do the rights conferred by the statute differ from those held under a common-law grant." Therefore, viewed merely as land with the ordinary incidents of ownership, the owner holds everything beneath the surface, subject only to the right of an adjoining locator or patentee, who has the apex of a vein, and who has complied with the statute, to pursue it on its dip beneath the surface. O'Connor has no part of the apex of the vein so situated with reference to the ore bodies within the triangle that he may pursue the vein from the surface. He cannot acquire any portion of the surface belonging to the relators; neither can he pass through the St. Lawrence from the point at which he made his discovery, or from any point within any of the surface owned by him. He is therefore not in a position, by virtue of his location, to maintain his claim to the ores in controversy. Under the principle of *Parrot Silver & Copper Co.* v. *Heinze, supra,* and upon the undisputed facts presented upon this application, they belong *prima facie* to the relators, as owners of the Rob Roy claim, and others to the south by virtue of their common-law rights. See, also, *Calhoun Gold Min. Co.* v. *Ajax Gold Min. Co.* (decided May 27, 1901), 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. —. It thus appears that the order of the district court, based, as it was, upon a state of facts showing *prima facie* that O'Connor has and can have no interest in the property which he seeks to inspect, was not justified.

This brings us to the consideration of the question: What remedy, if any, may this court afford? Counsel for defendants have filed an elaborate brief, in which they challenge the power of this court to interfere. They argue with much force that, though this court has, under the constitution, the power invoked in this proceeding, it can be exercised only "under such

regulations and limitations as may be prescribed by law;" that the authority to issue the six original writs enumerated in the constitution and defined by the Code is a denial of the power to issue any other writ; and that the power invoked must be exercised, if at all, under some one of these writs as they have been defined by the statute. In *State ex rel. Whiteside* v. *District Court,* 24 Mont. 539, 63 Pac. 395, we endeavored to point out, by what we deemed a proper construction of Sections 2 and 3 of Article VIII of the Constitution, that under that instrument there are four distinct grants of power, viz., appellate jurisdiction, a general supervisory control over all inferior courts, discretionary power to issue, hear and determine the various original writs enumerated, and the power to issue, hear and determine such other original and remedial writs as may be necessary to the complete exercise of the appellate jurisdiction. We also endeavored to define and point out the functions of these various powers so that each might be assigned its appropriate office within the purview of the constitution, and at the same time not to be permitted to encroach upon the functions of any other. The offices of the original writs authorized were discussed and defined, and it was pointed out that they were put into the hands of this court for prerogative uses, and not as aids to the appellate jurisdiction; following the previous decisions of this court in *In re MacKnight,* 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451, and *State ex rel. Clarke* v. *Moran,* 24 Mont. 433, 63 Pac. 390. It was further pointed out that these writs are not adapted to supervisory uses, for that they may not properly be wrested from their well-known and well-defined uses at the common law, which were inherent in them as adopted into the constitution. The power of supervisory control was discussed, and a tentative definition of its functions laid down, so that it might not be confounded with the other powers granted, and the clause granting it be thus rendered meaningless. The means at our disposal for its exercise were likewise discussed, and it was found that the legislature, so far as action by that body was necessary, had provided such means.

After studying the argument of the learned counsel in this case, and upon further consideration of the subject, we are confirmed in the conclusions reached in that case, not only that the power is distinct and independent of any other power granted, but that, from its nature, it must be exercised by means of instrumentalities distinct from those by which the others are made available. Counsel would have us conclude that the power must be exercised through the writ of *mandamus, certiorari*, or some other one of the original writs enumerated, because the constitution has authorized these writs, and they have been defined by law. A complete answer to this position is found in the proposition—the correctness of which is apparent upon a moment's consideration—that, in so far as this court can use these as original writs, it is entirely free from limitation or control by the legislature. The power to issue and to hear and determine them is lodged entirely within the discretion of this court, subject only to the limitations fixed for them in the constitution itself, or by usage at the time the constitution was adopted. (*State ex rel. Scharnikow* v. *Hogan*, 24 Mont. 379, 62 Pac. 493.) For this court to recognize any other limitation would be a violation of its duty to the same extent as if it should usurp powers not granted to it. Further than this, if we should sustain counsel in their position, the result would be to confound what they admit are two separate grants of power by assigning to the one the functions of the other.

Counsel suggest that the construction and application this court has given to Section 205 of the Code of Civil Procedure in *State ex rel. Whiteside* v. *District Court, supra*, amounts to a usurpation of power on the part of this court, in that, by holding that this section leaves this court to adopt its own procedure and process, the court has assumed to declare the "regulations and limitations" under which the power may be invoked and exercised,—a function which belongs exclusively to the legislature. The section referred to provides: "When jurisdiction is, by the constitution or this Code, or any other statute, conferred on a court or judicial officer, all the means necessary

to carry into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." The fault, if any, to be found with this provision is chargeable to the legislature, and not to this court. The legislature may not have enacted the wisest measure in thus leaving it to this court to adopt its own procedure and process, still this court may not be justly charged with going beyond its powers if its seeks to execute the will of the legislature as thus declared. We are satisfied with the construction given the section cited, deeming it a sufficient declaration of the legislature to authorize the use of the power in its utmost vigor.

The statute does not provide any appeal from the order, and, if any relief is to be obtained, it must be granted by an exercise of the power invoked. Neither *mandamus* nor *certiorari* will lie. By the former this court may coerce into activity, but it may not be used to control discretion, or to correct errors. By the latter an order made without or in excess of jurisdiction may be annulled or modified when there is no appeal or other adequate remedy. It cannot be used to correct errors of judgment in the exercise of jurisdiction. It could not be invoked to annul the order in question, for the reason that the order was made in the exercise of jurisdiction. The district court is authorized by law to hear all such applications, and to determine the question presented, namely, whether the showing made is sufficient. Necessarily, it also has the power to decide wrong as well as right.

Do the circumstances of this case show such an emergency as to warrant interference by this court? Unless the order be set aside, it will be executed at once. An appeal from a final judgment in the case would be ineffectual. By that time the relators will have been subjected to all the burdens of expense and inconvenience incident to the execution of the order. By its terms, O'Connor and his employees are for forty days per-

mitted to enter and inspect and survey any or all of the workings of the relators, whether in the claims adjacent to or remote from the ore bodies claimed by him; and that, too, in face of the fact that upon his showing he has no interest to be protected thereby. Counsel say that, even if this be the case, yet no great harm will be done. This may be true; nevertheless the order, without lawful reason, puts the property of the relators practically under the power of O'Connor, to be used at his pleasure for forty days, and compels the relators to furnish him with the means of ingress and egress at such times as he may reasonably require. Every citizen holds his property subject to the power of the state to prescribe reasonable regulations for the protection of the property and rights of others. This principle must always be recognized and enforced. The statute is itself a recognition of it, and, when properly applied, is a wholesome means for its enforcement. When misapplied, it becomes, as in this instance, a means of injustice and oppression; and a refusal by this court, with the views we entertain, to use its power to prevent the threatened wrong, would be a betrayal of the trust reposed in it by the constitution.

A writ will therefore issue, under the seal of this court, in the form of a peremptory order directing the district court and its judge to set aside the order made and entered on May 20, 1901.

Nothing we have said in this opinion is to be construed as a final adjudication of the rights of the parties in the case of O'Connor against the relators. What we have said is upon the undisputed facts as they appear in *this record.*

Writ granted.

MULLINS, APPELLANT, *v.* BUTTE HARDWARE CO., APPELLANT; NICKEL ET AL., RESPONDENTS.

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(No. 1,332.)

(Submitted May 13, 1901. Decided August 1, 1901.)

Mines and Minerals—Surface Rights—Location—Occupancy—Tenants in Common—Partition — Deeds — Registration—Notice — Evidence — Burden of Proof — Bona Fide Purchasers.

1. Where, prior to the location of a quartz mining claim, the surface was occupied by different persons, who agreed that one should locate for all, and that, after patent issued, conveyances should be made, vesting in each full title to the surface occupied by him, but the conveyances were in fact never made, the agreement and continued occupation after the patent issued did not constitute an oral partition, as the location of such claim confers on the locator the right to the exclusive enjoyment of all the surface ground.
2. Prior to the location of a quartz mining claim the occupants of the surface had but a naked possessory right, and after the location by one of them for all, under an agreement to convey to each the surface occupied, the right was but an equity to hold such person as trustee, and the agreement and continued occupation could not amount to an oral partition.
3. Tenants in common hold their lands by unity of possession, and each has the right to enter upon, occupy and use the whole or any part of the common property.
4. In so far as persons other than the tenants themselves are concerned, the actual occupancy of one tenant in common is the rightful possession of all the owners, and if a title under which they might hold is of record and is consistent with the occupancy, the possession must be referred to the record and will not be constructive notice of any other title.
5. The person securing the patent having executed deeds to each of the occupants for an undivided interest in the mine, but not referring to any surface interest as distinguished from the interest in the whole claim, the continued occupation of the separate portions of the surface, with payment of taxes, and the making of improvements thereon, was not inconsistent with the record title, and gave no notice to subsequent purchasers or incumbrancers that the occupant claimed any certain divided interest; and Civil Code, Sec. 302, relating to notice, had no application.
6. If the burden was on subsequent purchasers to show that they purchased interests in a mining claim for a valuable consideration, and without notice of the occupant's equitable unrecorded title to certain surface rights, such burden was discharged by the introduction of the deeds under which the purchasers held, setting forth a valuable consideration.
7. Where a grantee of a mine, with notice of an outstanding equity, conveys to one without notice, and for a valuable consideration, such purchaser is protected.
8. The record title to a mine held by the occupants of the surface was of undivided interests, without reference to any claim for separate and distinct surface right, and C. one of such owners conveyed an undivided in-

terest to M. by deed recorded in 1880. M. conveyed to H. by deed recorded in 1882. H. conveyed to D. by deed recorded in 1889. In 1885 the same owner C. conveyed another undivided interest to N. by a deed purporting also to convey a distinct surface right thereon. Held, that the recorded deeds to M. and H. were sufficient to protect D. and his grantees from a claim that they had notice of the claim to a distinct portion of the surface.

9. The occupancy of the lot by N., as his grantor's lessee, for a year and a half before his purchase, and his continued occupancy, was not notice of the separate claim to surface rights.

10. Even if M. and H. were chargeable with notice of N.'s claim, the title of D. and his grantees was superior.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

PROCEEDINGS by Patrick Mullins against the Butte Hardware Company and C. H. Nickel and others for the partition of a mining claim. From a judgment and from orders denying the motion for a new trial, plaintiff and defendant the Butte Hardware Company appeal. Reversed.

Mr. L. P. Forestell, for Plaintiff and Appellant.

Messrs. McBride & McBride, for Butte Hardware Company, Defendant and Appellant.

Mr. G. W. Stapleton, Mr. John W. Cotter, and *Mr. Charles R. Leonard,* for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

Mullins, the plaintiff, and the Butte Hardware Company, a corporation, one of the defendants, have appealed from a judgment and from orders denying motions for a new trial in an action for the partition of the Yellow Jack quartz lode mining claim.

On May 13, 1897, the claim, which is now within the corporate limits of the city of Butte, was located by one Cummings. When the location was made and for some time theretofore, Cummings, one Bowen, one Moss, one Hamilton and perhaps others, were occupying parts of the surface ground, each having

a dwelling house or other visible evidence of possession upon the part occupied by him. The principal purpose of making the location was to obtain title to the surface of the claim in order thereby to protect the occupants in their holdings and secure to them in severalty the ownership of the land used by them respectively. With this object chiefly in view the occupants agreed among themselves that Cummings should locate the claim for the benefit of all, that each would contribute his proportionate share of the expenses incident to procuring title, and that when patent issued the proper conveyances would be made, the one to the other, in order to vest in each full title to the surface ground occupied by him, and also to vest in him an undivided interest in the minerals in the same proportion as his surface holding bore to the entire surface. In compliance with the agreement the claim was located by Cummings. The receiver's receipt was issued on December 30, 1884, and recorded December 3, 1887. On December 21, 1893, the patent was issued to him and three others (including one Schwab), who had succeeded to the interests of certain of the occupants. The patent was duly recorded on January 17, 1894. The expenses were paid proportionately by those interested and the agreement fully performed except as to the making of the deeds conveying the surface rights in severalty to the respective occupants, Cummings delivering deeds of conveyances whereby the undivided interests of the respective persons in the mining claim were transferred to them in the proportions theretofore agreed upon, and the legal title which Cummings should acquire by patent was assured to them according to their several undivided equitable interests. All the deeds were duly recorded, the last on October 1, 1883. None of these deeds to the original occupants described or referred to any surface-ground interest as distinguished from undivided interests in the whole claim, nor did it in any way attempt to describe an interest in severalty. In 1885 Cummings made a deed to the defendant Nickel which, in addition to an undivided one-sixteenth interest in the Yellow Jack claim, purports to convey a parcel of land 50 by

243 feet in area which had been occupied by Cummings; but, as will be seen, this is not important in so far as the rights of the appellants are involved.

Intermediate the location of 1879 and the issuance of patent, as well as subsequently, sundry deeds, mortages, and other instruments were executed by the different owners to whom Cummings had, prior to 1884, conveyed undivided interests, in most of which the property conveyed or affected was described as undivided interests in the Yellow Jack lode claim, no reference being made to surface rights as distinguished or as held separate from the mineral interests. During all of this period, extending from a date anterior to the location down to the time when this action was begun, most of the respective occupants of the surface of the claim at the time of its location, and their successors in title, remained in open, visible, and notorious possession of, and paid taxes upon, the parts of the surface originally occupied and which they had agreed to convey after patent so that each might own in severalty. Some of the occupants and their grantees—notably Bowen, McDermott, and Nickel—erected permanent and valuable buildings. After 1885 there were several meetings had for the purpose of carrying out the agreement made among the original occupants of the several parcels of the surface ground, but owing to the nonattendance of one or more of the owners nothing further was ever done. The superintendent of the Butte Hardware Company attended some of these meetings. Mullins is not shown to have had notice or knowledge of the attempts to consummate the original agreement.

In the consideration of these appeals we shall endeavor to confine ourselves to the points made by counsel. We feel justified under the circumstances of the case in the inference that any question not presented by counsel is waived or its solution deemed unnecessary. So viewing the case, the plaintiff's chain of record title may be stated as follows: Deed dated June 7, 1880, by Cummings, the locator, conveying to Moss an undivided one-half interest in the claim; mortgage dated January

23, 1882, by Moss to one Hauser, conveying the same undivided interest (and purporting to convey also a piece of ground in area 67 by 120 feet); sheriff's deed consequent upon sale under foreclosure of the mortgage dated July 10, 1883; deed dated November 29, 1889, by Hauser to one Davis, of an undivided half interest, (subject to a prior deed of November 2, 1885, from Hauser to one Raymond purporting to convey the lot just mentioned); and deed made in 1895 by Davis to the plaintiff conveying all his interest (thirty undivided sixty-fourths) in the Yellow Jack lode claim. The record title of the Butte Hardware Company, so far as it is necessary to state it, stands thus: On June 18, 1880, Cummings conveyed to one Schwab an undivided one-fourth interest in the claim; on May 5, 1884, Schwab conveyed an undivided one-eighth interest to the Butte Hardware Company. The record titles of the respondents, the Bowen heirs, and McDermott, and Fitschen stand thus: Deed by Cummings conveying to Bowen one undivided eighth interest in the Yellow Jack lode claim, made and placed of record October 1, 1883; deed by Bowen conveying to McDermott one undivided sixteenth interest in the claim, made November 14 and placed of record November 15, 1883; deed by Bowen to Hauser and Fitschen purporting to convey to them an undivided one-eighth interest in the claim, made and recorded December 29, 1884; agreement by Hauser, Fitschen, Cummings, and Schwab (grantees named in the patent) with Bowen, to convey to him when patent should be issued an undivided one-eighth interest in the claim, made December 29, 1884, recorded July 11, 1885; through *mesne* conveyances the respondents named are clothed with record title to certain undivided interests in the claim.

The title of Moss to an undivided thirty–sixty-fourths interest in the claim having been thus vested in the plaintiff, he brought this action for the partition of the Yellow Jack lode claim, including the entire property conveyed by the patent irrespective of any supposed surface rights other than those incident to, following, and covered by, the title to the claim as

located and patented. The answering defendants, acquiescing in the right of the plaintiff as their co-tenant to a partition of the claim in so far as the minerals therein are concerned, insist, with the exception of the Butte Hardware Company, upon their exclusive ownership in severalty of the parts of the surface occupied by them and their predecessors in title, asserting that the facts made Cummings a trustee for them as to the minerals and as to the surface not actually occupied, constituted an oral partition of the occupied surface ground binding upon all of the original occupants, and created equitable titles as to the surface of which all persons had notice by reason of such occupation. The district court sustained the contention of the defendants, other than the Butte Hardware Company, and held that an oral partition had been made of the surface of the Yellow Jack lode claim, and that the surface ground claimed by the Bowen heirs, by McDermott, and by Nickel and others, had been orally partitioned and set apart to them.

We proceed to the consideration of every point made or suggested by counsel for the respondents:

1. The respondents contend that there was an oral partition of the surface ground among the several occupants, and that this has been shown by the agreement which was made in 1879, followed by the exclusive possession of the occupants and their successors and the payment by each of them of the taxes levied upon the land embraced within his holding, and by subsequent acquiescence on the part of the equitable owners in the supposed agreement for an oral partition. As to acquiescence, suffice it to say that the evidence does not tend to prove that Mullins or the Butte Hardware Company acquiesced in or ratified the former agreement. With respect to the agreement of 1879 and the continued occupancy thereunder of the persons who were then in possession, we are of the opinion that these facts did not constitute an oral partition. The location of a quartz mining claim confers upon the locator the right to the exclusive enjoyment of all the surface ground as well as of all the minerals within the lines of the claim (we are not

considering any question of apex or extralateral rights),—in other words, the location of a mining claim carries with it the right to the exclusive possession of the surface ground within the boundaries of the location. The location is a claim to the exclusive possession of the surface ground as well as to the veins and deposits beneath the surface. (*Talbott* v. *King,* 6 Mont. 76, 9 Pac. 434.) Title to the Yellow Jack quartz lode mining claim embraced, of course, title to the minerals and the surface ground within its exterior boundaries. That title was obtained from the United States government, the initial step having been taken by Cummings when he duly located the claim. In locating it, however, Cummings was unquestionably acting on behalf of himself and others under an agreement which made him a trustee and created a trust enforceable in equity, the validity of which has been too often recognized and adjudicated to permit its serious discussion as a novel or doubtful proposition. As among the original parties to the agreement and as to all persons who have acquired interests with knowledge or notice of the equitable title of the beneficiaries under that agreement, the title of the original occupants and their successors is beyond reasonable controversy, and hence we do not concur in the statement of counsel that the principal issue is whether or not there was an oral partition of the surface of the Yellow Jack lode claim, but rather regard the question of notice as the more important.

If the original occupants of the claim could in equity properly be treated as tenants in common of the entire claim or of its surface, or some part thereof, the question of their rights as among themselves could be easily solved by applying the principle recognized in *Mathes* v. *Nissler,* 17 Montana, 177, 42 Pacific Reporter, 763. But they cannot be so regarded. Between the time of the inception of their occupancy and the time when the claim was located, none of them had any title, or any right except that which attends the naked possessor; after the location by Cummings, their trustee, they acquired equitable rights gauged by the increasing and ripening title

of their trustee; but from the mere germinal stage of Cummings' record title to the day of trial there was never, as among the parties themselves, any joint interest or tenancy in common as to the occupied surface resulting from any of the relations existing among them. Whatever rights they had at any time as to the surface were, as among themselves, in severalty at all times. After the location and prior to the conveyances by Cummings to them, they were, of course, as among themselves, tenants in common of the minerals beneath the surface and of the unoccupied surface, but that common interest was also an equitable one and arose out of and resulted from the same oral trust contract which created their rights in severalty as to the surface of the claim or such parts of it as were covered by the contract between the occupants. If, therefore, they had any equitable interests as to the mining claim before receiving conveyances from Cummings, the actual locator, their rights at that time were because of, and co-extensive with, the trust agreement, and their rights in severalty as to the surface were as well defined and as well founded as were the rights which they similarly and simultaneously were acquiring to the minerals; hence, if the locator of the mining claim represented himself and others and became trustee for all in whose behalf he was acting, and by reason of the relationship and their contribution of the expenses, his associates, though unnamed in the location notice, had equitable rights which he was obliged to recognize and which were enforceable in equity, so that his subsequent transfers to them were not mere gratuities but were in recognition of contract rights and in fulfillment of contract obligations, then, for the same reason which made the transfers of the mineral rights obligatory, these persons were equally entitled to specific and separate estates in severalty in the surface of the claim under and by virtue of the trust agreement which was the sole source of all their rights. Their rights in the mineral interests were not greater than their rights to separate parts of the surface; both rested upon the same equitable foundation, and each was of equal rank with the other,—they were

twin equities, born at the same time, neither having any greater age or legal vitality than the other. Both of these distinct and definite equitable estates were created at the same time, and by the same mutual co-operative agreement, yet all through this litigation they have been discussed and treated as of vitally different degrees of validity, one being unanimously admitted to be a vested right, and the other to be a mere expectancy dependent upon conformity to the technical principles regulating or applicable to the rights of tenants in common, whereas the proof discloses that if any of these persons, other than the locator, ever had interests in the property, it was only by virtue of an agreement which particularly defined those interests to be in severalty in respect of the surface, as plainly and particularly as it defined those interests to be in common with respect to the minerals beneath the surface. The logical conclusion therefore is that, although Cummings and the persons to whom he granted undivided interests became, except as among themselves, tenants in common of the entire claim, no tenancy in common as to the surface of the claim ever existed *inter sese*; and hence all dispute in respect of the sufficiency as among the occupants of a supposed oral partition is necessarily eliminated from the case. Prior to the conveyances by Cummings to them, the original occupants were, in equity, tenants in common of the Yellow Jack lode claim, save as to the parts of the surface occupied by them, and as to these each was in equity the owner of the surface possessed by him. Such, as among themselves, were their relations to the claim.

The second question is whether the persons whose equitable estates in severalty as to parts of the surface were so well founded as among themselves, have preserved those rights in so far as the plaintiff and the Butte Hardware Company are concerned.

2. As among the parties to the agreement of 1879, there were, it is true, two distinct ownerships. There was ownership in the several lots and there was ownership of undivided interests in the minerals underlying the surface. But these owner-

ships were equitable and existed only among the parties to the agreement and as to those who became purchasers or incumbrancers with knowledge or notice of the facts. The respondents contend that the visible, open, notorious, exclusive and continued occupation in severalty by them and their predecessors in interest of parts of the surface ground was constructive notice of their equitable rights and titles. The law is well settled that the actual, visible, notorious, continuous, exclusive and unequivocal possession of "a definite tract of land by one rightfully in possession or holding under a valid title is a constructive notice to subsequent purchasers and incumbrancers of whatever estate or interest in the land is held by the occupant, equivalent in its extent and effects to the notice given by the recording or registration of his title." (2 Pomeroy's Equity Jurisprudence, Sec. 615.) Such possession is evidence of some right or title in the occupant and is sufficient to put a subsequent purchaser or incumbrancer on inquiry as to the rights of the person then in possession. But this general rule is not always applicable. It has its exceptions. One of the exceptions is stated in Section 232 of Webb on Record of Title thus: "Where a person occupies premises, and the record shows a conveyance under which he would be entitled to the possession, in such case his possession will be referred to the record title, and a subsequent purchaser will not be charged by it with notice of any other undisclosed title or equity which the occupant may have. The possession is a matter tending to excite inquiry, but the fact that the occupant has placed upon the public records written evidence of his right, with the terms of which his possession is consistent, arrests inquiry at that point, and reasonably informs the purchaser that he may rest upon the knowledge thus obtained. Thus, a wife was entitled to an interest in land by inheritance. A partition was had with other heirs, but the deed made thereupon was to both husband and wife, vesting the title of her portion in them as tenants in common; and as against lien creditors of the husband her possession was held notice of only an undivided half interest. So, where a mort-

gagee is in possession under a recorded mortgage, a purchaser from the mortgagor will not by such possession be charged with notice of an unrecorded conveyance of the equity of redemption from the mortgagor to the mortgagee, unless by the terms of the recorded instrument the mortgagor was entitled to possession at the time of the last purchase." Mr. Wade, in his treatise on the Law of Notice, says: "Circumstances may arise where one having title to real estate, and being in possession under his title, may nevertheless be prevented from relying upon such possession as notice to subsequent parties. As, for example, where, in addition to the title under which the proprietor occupies the premises, and which either rests in parol or is unrecorded, the record also shows a title under which he would be entitled to possession. In such a case his possession will be referred to his record title in preference to any other, and the purchaser will not be affected with notice of any undisclosed title or interest which the possessor may have. Thus, where a mortgagee is in possession under a recorded mortgage, a purchaser from the mortgagor will not be, by such possession, charged with notice of an unrecorded conveyance of the equity of redemption from the mortgagor to the mortgagee, unless by the terms of the recorded instrument the mortgagor was entitled to possession at the time of the last purchase." (Section 297.) "This exception is obviously just and reasonable. When a party places upon record an instrument, the provisions of which are consistent with his possession of the premises, while the circumstance of his being in possession undoubtedly has a tendency to excite inquiry in the minds of those contemplating a purchase, the fact that he has placed the evidence of his right to occupy upon record, where it is accessible to the whole world, arrests inquiry at that point, and plainly informs the purchaser that he may rest securely upon the knowledge already obtained." (Section 298.) In Section 616 of Pomeroy's Equity Jurisprudence the doctrine is thus stated: "The decisions may be regarded as agreeing upon the conclusion, which also seems to be in perfect harmony with sound principle, that where a title

under which the occupant holds has been put on record, and his possession is consistent with what thus appears of record, it shall not be constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, and has had no actual notice beyond what is thereby disclosed." Among the cases which support this doctrine, and we find none to the contrary, are the following: *Smith* v. *Yule,* 31 California, 180, 89 Am. Dec. 167; *Allday* v. *Whitaker,* 66 Texas, 669, 1 S. W. 794; *Wrede* v. *Cloud,* 52 Iowa, 371, 3 N. W. 400; *Holland* v. *Brown,* 140 New York, 348, 35 N. E. 577; *Rogers* v. *Hussey,* 36 Iowa, 664; *May* v. *Sturdivant,* 75 Iowa, 116, 39 N. W. 221, 9 Am. St. Rep. 463; *Brown* v. *Volkening,* 64 New York, 83; *Griffin* v. *Hall,* 111 Alabama, 601, 20 South. 485; *Plumer* v. *Robertson,* 6 Sergeant & Rawle, 184; *McMechan* v. *Griffing,* 3 Pickering, 149, 15 Am. Dec. 198; *Kendall* v. *Lawrence,* 22 Pickering, 542; *Bush* v. *Golden,* 17 Connecticut, 594, 602; *Commonwealth* v. *Lakeman,* 4 Cushing, 597; and 16 Am. & Eng. Enc. Law (1st Ed.) 803, and cases there cited. The purchaser is presumed to have relied upon the record. (*Hull* v. *Diehl,* 21 Montana, 71, 76, 52 Pac. 782.)

After the conveyances by Cummings, the original occupants and their successors in interest were, according to the title shown by the record, tenants in common of the entire Yellow Jack lode claim. Tenants in common hold their lands by unity of possession, and each has the right to enter upon, occupy and use the whole or any part of the common property. The possession of one is presumed to be for the benefit, and the maintenance of the rights, of all the co-tenants. (*Gunter* v. *Laffan,* 7 Cal. 589; *Brittin* v. *Handy,* 20 Ark. 404, 73 Am. Dec. 497; Freem. Co.-Ten., Secs. 166, 248; *Carpentier* v. *Webster,* 27 Cal. 544.) The occupancy of each was, therefore, consistent with the record title. We observe, in passing, that the provisions of Section 502 of the Civil Code are without pertinency to the question under discussion—that of notice. In so far at least as persons other than the tenants themselves are

concerned, the actual occupancy of one tenant in common is the rightful possession of all the owners, and if a title under which they might hold is of record and is consistent with the occupancy, the possession must be referred to the record and will not be constructive notice of any other title. We cannot concur therefore in the argument of counsel to the effect that the possession by Bowen and his heirs and by McDermott and others of the portions of the surface which had been set apart to them by the agreement of 1879, the making of improvements thereon, the payment of taxes, and the open exercise of rights of exclusive ownership, were notice of the titles, other than those appearing of record, under which they were occupying the property. All that was done was consistent with the rights of tenants in common. The possession was not unequivocal and must be referred to the recorded deeds of conveyance creating or evidencing a right to enter and remain in occupancy of the land. We are of the opinion, therefore, that the occupancy and the making of improvements did not serve to charge the appellants with constructive notice. The suggestion that the records of the county treasurer's office showing that each of several occupants paid taxes on the parcel of ground in his possession were sufficient to put the appellants upon inquiry has already been considered, but may be further answered by saying that such records are not, of themselves, constructive notice to purchasers or incumbrancers of the fact that certain persons have paid taxes. We are not advised of any statute which declares the record of the payment of taxes to have that effect.

3. It is contended, however, that the burden of showing that they purchased for a valuable consideration and without notice, rested upon the appellants, and that unless such proof was made the respondents must prevail. Sections 258, 259, and 260 of the Fifth Division of the Compiled Statutes of 1887, provide, in substance, that every conveyance and every instrument setting forth any agreement to convey any real estate shall, from the time it is filed for record, impart notice

to all persons of its contents, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice; and that every such conveyanace which shall not be recorded shall be deemed void as against any subsequent purchaser in good faith and for a valuable consideration whose own conveyance shall be first recorded. Sections 1640, 1641, and 1644 of the Civil Code declare that every conveyance of real property is, from the time of its filing for record, constructive notice of the contents thereof to subsequent purchasers and mortgagees; that it is void as against any subsequent purchaser or incumbrancer in good faith and for a valuable consideration whose conveyance is first recorded, and that an unrecorded instrument is valid as between the parties and those who have notice thereof.

Oral agreements affecting the title to real property, being incapable of record, are certainly not within the express language of these sections. They are, however, within those equitable principles under which the rights of innocent purchasers are enforced as against secret equities, whether arising from an oral contract or an uncertified instrument, neither of which is susceptible of record, or from an instrument certified but not recorded; and while such equities are not within the very words of the registry act, they are within its plain purpose and spirit, law and equity going hand in hand. Manifestly, "so far as the object of requiring registration is to protect purchasers in good faith, and give simplicity and certainty to the title to real estate, it must be frustrated whenever secret trusts or equities, whether arising by deed or without it, are allowed to prevail against conveyances duly recorded." (2 Leading Cases in Equity, p. 139.) The right created by a prior unrecorded instrument, even though it purports to convey and does transfer, as between the parties to it, the legal title, should, as to purchasers without notice, be regarded "as tantamount to an equitable interest, which may, therefore, be cut off by a subsequent purchaser or incumbrancer who is in all respects *bona fide,* and who has also obtained the first record" (2 Pom-

eroy's Equity Jurisprudence, Sec. 758), when the statute requires prior recordation. There is no reason why equities not arising by a written instrument should occupy a better position and be more tenderly regarded than equitable interests which rest upon writings.

In the case at bar each appellant claims title to an undivided interest in the land by a deed of conveyance purporting to have been made for a valuable consideration. In *Hull* v. *Diehl,* 21 Montana, 71, 52 Pacific Reporter, 782, the purchaser of the later though first recorded mortgages proved that he paid a valuable consideration, but there was no other evidence tending to establish that he was without knowledge or actual notice of the prior mortgage. In that case the court said: "Whether the burden of proving the payment of a valuable consideration is upon the person claiming under a conveyance recorded before the record of a prior conveyance is not presented for decision in this case, and we express no opinion. We are, however, satisfied that the good faith of the purchaser will sufficiently appear by proof of the record of conveyances showing title in his grantor at the time of the purchase, upon which record he had the right to rely, and is presumed to have relied. If he had actual notice of the prior conveyance, this is a fact affirmative in its nature, and it is therefore more reasonable to require it to be shown by the party claiming under the prior unrecorded deed than to call upon the purchaser to prove the negative." Nor is it necessary in the present case to determine whether the burden of proving the payment of a valuable consideration is cast by the law upon the subsequent purchaser holding under a deed first recorded, for, as we have stated, the deeds to the appellants recited the payment of valuable considerations, and the doctrine is clearly established upon principle and by the weight of authority "that one claiming title to land by a deed to him purporting to be made for a valuable consideration is presumed to be a purchaser in good faith, without notice of prior unrecorded deeds, until the contrary is shown; and that the burden of proof to show notice and want of good faith is

on the party attacking the deed." (*Anthony* v. *Wheeler,* 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 288, note.) The respondents sought to establish rights to the Yellow Jack lode claim in hostility to the title of record; they were therefore bound to prove notice to the holders of the titles of record of the facts upon which their supposed rights were founded. If the burden devolved upon the appellants to show that they paid value, the burden was *prima facie* discharged when the recorded deeds under which they held were introduced. In addition to those already referred to, we select the following cases as supporting the doctrine that the recital in the deed raises a rebuttable presumption of the payment of a valuable consideration, and that the burden of proof to show notice of the earlier-made instrument not first recorded or of the oral contract, rests upon the party claiming rights under the latter: *Hiller* v. *Jones.* 66 Mississippi, 636, 6 South. 465; *Wood* v. *Chapin,* 13 New York, 509, 67 Am. Dec. 62; *Ryder* v. *Rush,* 102 Illinois, 338; *Hoyt* v. *Jones,* 31 Wisconsin, 389; *Smith* v. *Yule, supra; Bush* v. *Golden, supra; Roll* v. *Rea,* 50 New Jersey Law, 264, 12 Atl. 905; *Brown v. Volkening, supra; Hendy* v. *Smith* (Sup.), 2 New York Supplement, 535; *Beman* v. *Douglas* (Sup.), 37 New York Supplement, 859; *Doody* v. *Hollwedel* (Sup.), 48 New York Supplement, 93; *Holland* v. *Brown, supra;* and *Gratz* v. *Land & River Improvement Co.,* 82 Federal Reporter, 387, 27 C. C. A. 305, 53 U. S. App. 499, 40 L. R. A. 393. The principle governing the decision in *Thamling* v. *Duffy,* 14 Montana, 567, 37 Pac. 363, 43 Am. St. Rep. 658, is inapplicable.

4. It is next contended that the Butte Hardware Company, through its superintendent, had either knowledge or actual notice of the agreement of 1879 and hence was not a purchaser in good faith. The company received its deed to an undivided one-eighth interest on May 5, 1884, and the deed was recorded on the same day. The evidence tends to show that the superintendent had actual notice of the equitable rights of the occupants after 1885, but does not tend to show that he had it prior thereto; so there is nothing to indicate that the company (as-

suming that notice to the superintendent was notitce to it) had actual notice until after it purchased. True, Schwab, its immediate grantor to whom Cummings had conveyed and who is named in the patent as a grantee, had actual notice at the time he acquired his interest in the claim; but if one who has notice of an outstanding equity conveys, mediately or immediately, to a purchaser without notice who pays a valuable consideration, such purchaser is entitled to protection. This is an ancient and established doctrine in chancery courts. The rule prevails also under the recording statutes; and the company having literally complied therewith, perfected its title as against the outstanding unrecorded equities.

5. It is also suggested that both Mullins and the company were charged with constructive notice of Nickel's rights by the record of his deed which conveyed an undivided interest in the whole claim and purported to convey also a lot thereon. This deed was made on March 16, 1885, and was recorded on June 16, 1885. As to the company the record of the deed could not be constructive notice, for its deed from Schwab was delivered and recorded in 1884. Nor was it constructive notice to Mullins. Cummings conveyed an undivided interest to Moss, and the deed therefor was made and placed of record in 1880; Moss conveyed to Hauser by deed made and recorded in 1882; Hauser conveyed to Davis by deed made in 1889 and recorded in 1890; and Davis conveyed to Mullins by recorded deed dated in 1895. Although the deeds from Hauser to Davis and Davis to Mullins were executed after the record of the deed from Cummings to Nickel, the deed of Cummings to Moss and the deed of Moss to Hauser were duly recorded in 1880 and 1882, respectively; and long before the deed from Cummings to Nickel was made. In so far as constructive notice is concerned, the recordation of the deeds from Cummings to Moss and Moss to Hauser was sufficient to afford protection to Mullins as against Nickel's subsequently recorded deed from Cummings, despite the fact that the *mesne* conveyances under which Mullins asserts title were made and recorded after the conveyance by

Cummings to Nickel had been recorded. The deed from Cummings to Moss, as well as the deed from Moss to Hauser, is Mullins' conveyance within the meaning of the statute, and it was duly recorded before Cummings conveyed to Nickel. The statute was satisfied. There is much conflict upon this question, but we are satisfied with the rule announced in *Hull* v. *Diehl, supra,* and in *Hooker* v. *Pierce,* 2 Hill, 650. Nor does it seem that the deed to Nickel is in the chain of Mullins' title.

6. The further suggestion is made that the appellants were charged with constructive notice of Nickel's rights by his possession of the parcel of ground described in this deed from Cummings. We think not. When the lode claim was located, Cummings was occupying the lot. Cummings conveyed to Nickel on March 16, 1885. The evidence shows that when the deed was made, Nickel was living on the lot and had been "there about a year before" as lessee of Cummings. This falls far short of being sufficient evidence to warrant the inference that Nickel was in possession at the time Schwab conveyed to the company or that he was occupying otherwise than as a mere tenant, and there is nothing to show that he was in possession under a contract of sale from the person who had theretofore by recorded deeds conveyed to the grantor of the company, and to others, undivided interests in the land whereon is situate the lot to which Nickel asserts title. Nor was Mullins charged with constructive notice of Nickel's occupancy. Undivided interests were conveyed by Cummings to Moss and by Moss to Hauser, and the deeds therefor were recorded long before Nickel went into possession. True, Nickel was in possession under his deed from Cummings when Hauser conveyed to Davis and when Davis conveyed to Mullins; but the evidence fails to show that Nickel had any right or interest in the property either when Cummings conveyed to Moss or Moss to Hauser. But even if Nickel, as between himself and Cummings and as to Moss, had a prior right to or interest in the land, Mullins' title is the better. A., the holder of the legal title of record, conveys or contracts to convey land in his possession to X.; A. then

conveys the same land to B. (a purchaser with notice), who puts his deed on record; B. conveys to C., who puts his deed on record; X. then puts his contract or deed on record and for the first time enters into possession; while X. is so the possessor, C. conveys to D. who purchases for a valuable consideration and without notice of the rights of X., unless notice be charged by his possession or recorded deed. Is either the recorded deed to X. or his possession constructive notice to D.? We think not. While the possession of X. at the time C. conveyed to D. would charge D. with constructive notice, equivalent in effect to the record of a deed from C. to X., of whatever estate or interest X. had under or from C. (the record owner), yet neither the recorded deed from A. (whose title of record had passed to C.) to X. nor the occupancy by X. could be constructive notice to D. of any title or right of X. as against A. or B. So far as D. is concerned, X. has no title, legal or equitable, and therefore no rights of which constructive notice could be given.

The orders and the judgment appealed from are reversed and the cause is remanded with direction to grant a new trial.

Reversed and remanded.

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SWEENEY, RESPONDENT, *v.* MONTANA CENTRAL RAILWAY COMPANY, APPELLANT.

(No. 1,326.)

(Submitted April 18, 1901. Decided August 1, 1901.)

Trespass—Diverting Water Course — Release of Damages—Repairing Injury—Evidence—Appeal—Former Opinion—Questions Decided—Ex Parte Order—Instructions—Briefs.

1. Defendant railway company entered on plaintiff's mining claim, and diverted the waters of a creek which crossed the claim. Afterwards plain-

tiff conveyed to defendant a 40-foot strip across his claim, and across the old bed of the creek, and released "all claim for any damages that may arise or be caused to the land adjoining such railroad, on either side thereof, in consequence of the use of said premises for its said road." *Held*, that such conveyance did not release plaintiff's claim for damages for the trespass previously committed in diverting the creek.

2. In an action for trespass and diverting a stream crossing plaintiff's land, defendant should be permitted to show what it would cost to restore the stream to its former channel, as the measure of damages would be the expense of such restoration and such other damages as could not be avoided.
3. Where, in the opinion on a former appeal, the court said that they would treat only those points which appellant had taken up on his oral argument, and closed with the remark that "we have considered and treated all the errors assigned which we consider material," such decision should not be deemed as determining any questions in the case other than those discussed in the opinion.
4. In an action for injuries caused by diversion of a stream, evidence that plaintiff, by a small expense in riprapping the bank of the new channel, could have avoided or diminished the damages to his property, was admissible, it being his duty to use reasonable care to save it from injury.
5. One is not, as a rule, expected to enter upon a third party's premises to save his own property from increased injury resulting from the wrong act of another; but it is not unreasonable to expect an injured party to go upon a vacant, uninclosed and unoccupied mining claim to prevent serious damage, in a great emergency.
6. Where a railroad company commenced condemnation proceedings to acquire a right of way across plaintiff's land, and procured an *ex parte* order permitting it to take possession of the land without payment, and staying all actions and proceedings against it, such order was void, and any entry on plaintiff's land thereunder was a trespass.
7. It is not error for the court to refuse to give a requested instruction which contains a statement of an alleged fact which it is within the province of the jury to find or not, according as they may or may not believe the witnesses upon the point.
8. An assigned error which is not argued in the briefs will not be considered.
9. Where, in an action to recover for permanent injury to land occasioned by a trespass, a witness is questioned as to the value of adjoining land, and a map is used, and land inquired about is pointed out to the jury by counsel, the receipt of such testimony is not error, since, as the jury saw the map at the time counsel was pointing out the ground, the supreme court cannot say that the jury did not understand the situation; though this method of introducing evidence is not to be approved.
10. In an action for trespass and permanent injury to land, it was error to receive testimony of plaintiff and another as to what was offered for a strip across the land for a railroad, where there was no evidence that the one making the offer was agent of the railroad company, or had any authority to make the offer.
11. Where land has been permanently injured by a trespass, witnesses familiar with it, and with the uses to which it could be put, may give their opinion of its market value, in view of such uses, though it may not have been previously used for such purposes.

MR. JUSTICE PIGOTT dissenting in part.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Patrick Sweeney against the Montana Central Railway Company. From a judgment for plaintiff and from an order denying a new trial defendant appeals. Reversed.

STATEMENT OF THE CASE.

This cause is on appeal from the order of the district court denying a motion for a new trial and from the judgment for plaintiff.

The action is for damages resulting from trespass. Plaintiff, in 1891, was the owner, by virtue of a mineral location, of a tract of land called the "Nellie L. Claim," at Neihart, Cascade county. In that year the defendant company started condemnation proceedings in the district court to condemn a strip of ground eighty feet wide across the claim. Without paying or tendering to the plaintiff or any one any money or other consideration, and without paying into court anything at all, an order was obtained by the company admitting it to possession of the property sought to be condemned, and providing, among other things, that during the pendency and until the conclusion of the proceedings all actions and proceedings against the plaintiff on account thereof "be, and the same are hereby, stayed."

Belt creek at the time passed through the claim, as well as through other pieces of property belonging to other persons. The company, under the order mentioned, went upon the plaintiff's land, and excavated a new channel for the creek, and by means of a dam built in the creek, on what was known as the "Graham & Hollowbush Claim," a short distance from and above plaintiff's land, diverted the waters into the new channel. This work was completed about November 1, 1891. Plaintiff entered the claim at the United States land office on December 28, 1891. The village of Neihart was incorporated on December 4, 1891. On the 2d day of January, 1892, plaintiff conveyed his claim to one Condon. It is understood between the parties that this deed was for the purpose of procuring a better

price for the eighty-foot strip from the commissioners in the condemnation proceeding, as plaintiff's relations with one of them were not as friendly as were those of Condon, the deed being in fact in trust for the plaintiff. On March 24, 1892, Condon conveyed, acting for plaintiff and with his advice and consent, a forty-foot strip of the said claim to the railway company, in fee, to be used as a way for railroad purposes, such strip embracing only a very small corner of the eighty-foot strip. After the deed was made, the company abandoned the condemnation proceedings, and notified plaintiff of such abandonment. After the delivery of the deed for the forty-foot strip, Condon reconveyed the remainder of the land to plaintiff.

Plaintiff contends that the order made permitting defendant to enter the land was void, and that the entry, the digging of the new channel on his land, and the turning of the water into it, were a trespass, and operated to materially lessen the market value of the property. Defendant, in the brief of former counsel, claims that, though the act of changing the course of the stream was originally a trespass, no action can be maintained for damages on account thereof, by reason of the fact, as counsel says, that the plaintiff, through his trustee, Condon, ratified and adopted defendant's acts, took the benefit thereof, and received from defendant compensation on account thereof, by selling and conveying to defendant the forty-foot strip, extending, as it does, across the old channel, without reserving a right to return the creek to the old bed, and, further, that the plaintiff is by the deed estopped from claiming damages. The deed contained the following: "And said first party hereby releases to said second party any and all claim for any damages that may arise or be caused to the land adjoining such railroad, on either side thereof, in consequence of the use of said premises for its said road."

This case was heard and decided upon a former appeal, being reversed, a statement of the case being made in the opinion. (19 Mont. 163, 47 Pac. 791.)

The principal questions arising upon the present appeal

relate to the correctness of certain rulings of the court upon the admissibility of evidence, the refusal of the court to grant a nonsuit or direct a verdict for the defendant, and upon certain instructions given and others refused.

Present counsel for defendant, in oral argument and in his brief, very ably contends that the order was not void, for that the owner waived the right to exact prepayment for damages, and that the complaint does not state a cause of action in trespass *quare clausum fregit,* and is fatally defective, for the reason that it does not show forth that defendant's entry was wrongful. He claims that defendant owner, in the condemnation proceedings waived his constitutional right to demand compensation before the company took possession under the order of the court, by failing to make seasonable demand for it, and by his appearing and answering in the condemnation proceedings.

The order of the court, permitting the company to enter upon the land, was made *ex parte,* and without notice.

Mr. A. J. Shores and *Mr. I. Parker Veazey,* for Appellant.

Mr. Thomas E. Brady, Mr. M. S. Gunn, Mr. John B. Clayberg and *Mr. N. W. McConnell,* for Respondent.

MR. JUSTICE MILBURN, after stating the case, delivered the opinion of the Court.

The appellant makes twenty-one assignments of error. We shall consider only those depended upon in the argument of appellant's counsel.

During the trial, at the close of the testimony for the plaintiff, the defendant moved the court "that the action be dismissed on the ground that by the sale and conveyance to the defendant of the 40-foot strip of ground for a right of way across the Nellie L. lode claim, shown by the evidence to have been sold and conveyed, the plaintiff is estopped from making any claim for damages done, if any were sustained, by the

change in the course of the stream, and that the execution and delivery of such conveyance operated to destroy any right of action for the previous trespass, if any such existed." The motion was denied and defendant excepted.

Did the making and delivery of this deed, or the waiver of damages expressed therein, estop the plaintiff to the extent claimed by defendant? We think not. More than one-half of the argument in appellant's brief is upon the subject of the said conveyance and its effect upon plaintiff's case. The argument is made with that close and able reasoning which characterizes counsel, but, in our opinion, it proceeds upon a theory which does not apply to the facts or the law of this case. Counsel cites *Roberts* v. *Roberts,* 55 N. Y. 275; *Lampman* v. *Milks,* 21 N. Y. 506; *McCarty* v. *Railroad Co.,* 31 Minn. 228, 17 N. W. 616; *Radke* v. *Railway Co.,* 41 Minn. 350, 43 N. W. 6; *McDonald* v. *Railway Co.,* 101 Cal. 206, 35 Pac. 643. We do not find any of these in point. In *Roberts* v. *Roberts* it was the owner of the land who had permanently changed its condition by effecting an advantage to one part and burdening another, and the court held that upon a severance the respective owners held the land according to such changed conditions, there being, of course, no damage ever done by any one to the said owner. In reason and justice, and upon old and very respectable precedents, which have always been cited with approbation (see opinion in *Lampman* v. *Milks, supra*), the court was correct. The difference between the case at bar and that of *McCarty* v. *Railway Co.* is that the latter was a suit for damages for obstructing the flow of water by a railway embankment for the building and maintenance of which plaintiff had sold a certain strip of land,—the case at bar, one for completed trespass committed on another part of the land, a considerable time before the conveyance of the strip across the old channel. In *Radke* v. *Railway Co.* the court held that no right of action lay for damages subsequently caused by a bad culvert in the railway embankment built upon land entered upon by the railway company without right, but subsequently

conveyed by the owner to the company with the bad culvert then in said embankment. In *McDonald* v. *Railway Co.* the owner by deed conveyed to the company a right of way for the track "as the same is now located, constructed and operated," and expressly waived all damages by reason of the construction and operation of the same, and acknowledged "payment for damages for any injury caused by the construction of said railroad in front of his property" on a certain street; the suit being for damages resulting from an overflow of plaintiff's property caused by a certain bridge which choked the channel of a stream of water, the bridge being the same that was on the right of way at the time of the conveyance to the railway company.

The suit in the case at bar is for damages recoverable for trespass upon a relatively large tract of land, part of which was afterwards conveyed to the defendant, the trespass being complete as of November 1, 1891, before the making and delivery of the deed of conveyance for the part. The deed to the defendant company must be considered exactly as if it had been to a third party, a stranger to the trespass. It conveyed part of a tract alleged by the plaintiff to be then damaged land. The chose in action in trespass was not conveyed any more than if the deed had been made to a stranger. The waiver of damages set forth in the instrument of conveyance is obviously and manifestly for such damages as might come from the use of the strip as a way for the road. If it was intended to say that the company was released from all claim for damages for trespass resulting from the unlawful entry upon the property of plaintiff when it went upon the premises and dug a large ditch upon another part of the land, it would have been easy to have said so; such a thing would not ordinarily be pertinent to such a deed, and cannot be read into it by us.

We are of the opinion that just as the deed, if made to a stranger, would have estopped the owner of the land from turning the stream again across the ceded strip, so, also, it would do after conveyance to the railway company; but the right to sue accrued at the time of the completed trespass, November

1, 1891, before the sale of the strip of damaged land. The question, "Did the deed estop claim for damages accruing when the trespass was complete?" is a far different question from, "Did the deed operate as a waiver of the right to return the stream to the old bed, and thus to mitigate damages?"

There is nothing in the evidence to show that a larger price was demanded or received by the owner, or offered by the company, in consideration of the strip of land being at the time free from the burden of Belt creek, or to show that this particular part of the damaged tract of land was worth more or less because of the removal of the creek to the new channel.

The deed estopped plaintiff from returning the stream to the old bed after the delivery of the deed, but did not operate as a waiver of proper damages resulting from the completed trespass.

The defendant complains of the court's refusal to admit evidence as to the probable cost of returning the stream to its old channel, and restoring the premises to substantially the condition in which they were prior to the trespass. Notwithstanding the earnest and full argument of counsel for defendant in his brief, contending that the deed estopped plaintiff from claiming any damages, measured by the cost of such restoration of the premises, or at all, he forcibly argues that evidence of such cost should have gone to the jury. We agree with counsel that this evidence should not have been excluded. Upon the former appeal (19 Mont. 163, 47 Pac. 791) it was held that the refusal of the court below to allow evidence to show that plaintiff, by an expense of $100 in riprapping the bank of the new channel between the stream and the bluff on the land in question, could have avoided or diminished the damages to the mining claim, was error. To hold, in the face of this declaration, that plaintiff was estopped by deed from claiming damages, would be to reverse the judgment of this court as to a conclusion which is part of the established law of this case. The opinion in the case on the former appeal supports fully the proposition that, in cases of tort, such as the one at bar, it

is not only the privilege, but the duty, of the injured party to use reasonable care, skill and diligence, adapted to the occasion, to save his property from being injured; otherwise, it would not have held the evidence as to the cost of riprapping as admissible.

Mr. Justice Brewer, in *Kansas Pac. Railway Co.* v. *Mihlman,* 17 Kan. 224, collating and considering the numerous authorities supporting him, says: "The proposition is sound that, while a wrongdoer should compensate for all the injury naturally and fairly resulting from his wrong, yet the party upon whom the wrong is done should take reasonable care of his property, and make reasonable effort to prevent any extension of the injury. If a party can, with reasonable effort, prevent an injury from spreading, he ought to do it. It is no more than simple justice to the party who has caused the injury, especially if that party has acted without malice, and without a thought of causing injury." In *Loker* v. *Damon,* 17 Pick. 284, cited by our court in the former appeal of this cause, the court, through the learned Chief Justice Shaw, said: "We think the jury were rightly instructed that, as the trespass consisted in removing a few rods of fence, the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence;" and in the case before Justice Brewer, *supra,* he held for the court that the question ought to have been submitted to the jury whether Mihlman could not, with reasonable effort and small expense, have filled up the ditches, repaired the wrong done by the company, and prevented any destruction of his crops, or depreciation of the value of his real estate, and that the jury should have been instructed that, if this were so, the measure of damages would not be the value of the crops destroyed, but the cost of filling the ditches and placing the land in the condition it was before the trespass, together with the value of the direct injury done by the trespass.

It was held on the former appeal of this case that the trespass was a completed trespass, and not a continuous one; that

"the sole liability of the defendant company was determined and fixed by the trespass which wrought the difference in the market value of the land before and after its commission, in November, 1891." What was the position in which plaintiff found himself after the defendant committed the trespass? If his land was injured, what was the measure of the damages? If he could reasonably and at moderate expense have riprapped the stream, if this would have obviated the damage or prevented increase of the injury, or if he could have, by expenditure of a sum reasonably within his means and warranted by the circumstances, returned the stream to its old bed, and filled up the excavation, if this would have avoided or materially diminished the damages, then one or the other of these methods he should have adopted, and the expense would be the measure, with such accrued damages as could not be avoided by the means adopted. If, for good and sufficient reason, he could not adopt and execute either method, then, the measure of damages being the difference between the value of the land before and just after the complete trespass, he would, in estimating the value of the land after the trespass, with other things, consider the nature of the stream, the size and condition of the ditch, and the probability of overflow of his land. Thus we may fully understand the holding of the court on the other appeal that it was not error to admit evidence on the first trial as to the overflows and wasting away of the land after the date of the trespass complained of, for the purpose of showing the difference in the market value of the land before and after the trespass, but that it was error not to limit the evidence to that purpose, as the defendant requested the court below to do.

We are of the opinion that the court should have permitted the jury to consider, among other circumstances appearing in evidence, what the cost would have been to avoid the damages, in whole or in part. If such efforts to avoid increased damages were such as the plaintiff could reasonably undertake and perform, and such as would have avoided the overflow, then no evidence, under proper instructions, as to overflows would have

been considered by the jury in measuring the damages. If, after weighing the evidence, the jury, under proper instructions, considered that the plaintiff could not have reasonably undertaken any method to protect or restore the land or prevent the floods, then the evidence as to the floods, if the result of the trespass, would be proper to consider for the purpose of finding the difference in the market value of the land before and after the trespass.

Respondent's counsel maintains in his brief that the question of the alleged error of the court in excluding the proffered evidence as to the cost of returning the stream into its old channel, and filling up of the new, is not before this court for determination, for the reason that the question was decided on the former appeal. Judge Pemberton, then chief justice, in the opinion, without especially referring to the point which we are now referring to, said: "We have considered and treated all the errors assigned which we consider material." This remark must be weighed in connection with the declaration in the first part of the opinion to the effect that the opinion would treat only of those points which appellant had taken up in his oral argument. We cannot, therefore, believe that, upon fair construction of the remarks of the chief justice depended upon by respondent's counsel, they should be considered as meaning anything more than that it was not necessary, for the determination of the case, to treat of other points.

Counsel for respondent argues that the plaintiff had the privilege, but that it was not his duty, to do anything to reduce or avoid the damages likely to follow. In support of his contention he refers us to *Jarvis* v. *Railway Co.*, 26 Mo. App. 253, and from the citation we quote thus much: "The contention is that he [plaintiff] was bound to go and abate the nuisance created by the defendant, *since the law allows a private person to abate a nuisance where it can be done without committing a breach of the peace.* [Italics not in the opinion.] Undoubtedly it was the plaintiff's *privilege* to abate this nuisance at his own expense; but it does not lie in the mouth of

the author of the nuisance to say that he was bound to do it." A citation is also made from *Paddock* v. *Somes,* 102 Mo. 238, 14 S. W. 746, 10 L. R. A. 254, from which we take the following: "It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not, prevent damages to his property therefrom, is no defense either to an action at law or in equity. A party is not bound to expend a dollar or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another." From *Heaney* v. *Heaney,* 2 Denio, 625, respondent's counsel cites this sentence: "The injury complained of was voluntary, and, if wrongful, the plaintiffs were under no obligation, legal or moral, to take any steps to mitigate the consequences to the defendants." He also calls attention to the following from *French* v. *Lumber Co.,* 145 Mass. 265, 14 N. E. 113: "The court properly refused to rule that plaintiff could recover only for what he had expended in removing the obstructions. It did not appear that it was possible for the plaintiff to have removed them. Certainly he owed no duty to the defendant to remove the logs and sand with which the defendant continued to obstruct the river." He finds, also, that in *White* v. *Chapin,* 102 Mass. 138, the court held that plaintiff was not under the necessity of seeking any part of his remedy by going upon the defendant's land and abating the nuisance caused by obstructions which defendant had there placed in the ditch, but that he had a right to elect his remedy by an action at law.

It is useful to note, in the case from Denio, in which such broad language is used, that defendants in 1846 cut a vessel loose from the wharf, and that plaintiff, the owner, stood by and watched it go to wreck against Staten Island, when, before it had floated far, he might have overtaken it with a boat and brought it back, at a moderate expense; and, further, that plaintiff made no effort to recover or save the vessel. It seems to us as unnecessary in this enlightened century to say that the damage to the boat was the direct and natural result of the

revengeful spirit of the owner of the boat, and not of the act of the defendant.

A logical deduction to be drawn from, and entirely within the scope and meaning of, the citations is this: If A. go into B.'s house, and remove therefrom very valuable and perishable property, which will be destroyed by exposure to the weather, and deposit the same upon the vacant and uninclosed desert claim of C., then, although A. has the privilege to go upon the land of C. to recover his property, if he can do so without a breach of the peace, he is under no obligation to do so, although he can with only the expenditure of sixty seconds of time, and by a walk of ten yards, pick up the imperiled property, and put it back into the house. Would any court uphold a verdict of, say, $1,000 damages for the loss of a valuable painting destroyed by storm under such circumstances, although A. maliciously removed the picture and exposed it with intent to destroy it? We think not. *A fortiori,* if the act was done in a fit of frivolity, without intention to destroy the property. Is it not a question for the jury to determine what reason required of the owner to do? Whatever reason requires a man to do should be done, if the law does not forbid. What is just and what reason demands must be one's duty under the law, unless the law of the land forbids.

As expressing our views, and as opposed to those cited by respondent's counsel, we quote the following—one or more of them being from courts of states from which one or more of the authorities of respondent are taken: "Aggravation of injuries by subsequent negligent conduct on the part of plaintiff may be considered by the jury in mitigation of damages." (*Fullerton* v. *Fordyce,* 144 Mo. at page 533, 44 S. W., at page 1056.) "For the direct and consequential damages caused by an injury the party committing it is responsible, but not for remote, speculative and contingent consequences, which he might have easily averted by his own exertions. The law will not reward a man for the indulgence of his malice. If a party sustaining an injury by the act of another can protect himself

by a trifling expense, or with reasonable exertions, from the consequences, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other party liable." (*Douglass* v. *Stephens*, 18 Mo., at page 366.) "If a party can, by a trifling expense or by reasonable exertions, avert the damages caused by the wrongful act of another, it is his duty to do so; and, if he fails in performing the full measure of his duty in this regard, he will be only entitled to recover such damages as were not the result of his negligence or omission." (*Waters* v. *Brown*, 44 Mo., at page 303.) "It is now well settled that one who is injured by another has no right to lie by and suffer damages to accumulate which it is in his power to prevent. He must use proper diligence to prevent or arrest the effect of the injury. Whatever he voluntarily suffers, which by reasonable exertion he may avoid, he must charge to his own account." (*State ex rel. Rice* v. *Powell*, 44 Mo., at page 440.) "It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another, if he can do so by ordinary effort and care and at moderate expense." (*Harrison* v. *Railway Co.*, 88 Mo., at page 627.) "After the wrong was committed, it was certainly the duty of the appellee to avoid the consequences of that wrong, as far as he reasonably could. If by labor, or a reasonable outlay of money, he could have stayed or avoided the consequences of the appellant's wrong, he should have done so. All consequences resulting from his own willful failure or gross neglect to use timely and reasonable precaution to prevent an extension or increase of the injury should fall upon himself." (*Lawson* v. *Price*, 45 Md., at page 136.) "As it is the duty of a party injured by a breach of contract or tort to make reasonable effort to avoid damages therefrom, such damages as might by reasonable diligence on his part have been avoided are not to be regarded as the natural and probable result of the defendant's acts. There can be no recovery, therefore, for damages which might have been prevented by reasonable efforts on the part of the person injured." (*Scherrer* v.

Baltzer, 84 Ill. App. 128; 8 Am. & Eng. Enc. Law (2d Ed.) p. 605, and numerous cases cited.) See, also, Judge Brewer's views in *Kansas Pac. Railway Co.* v. *Mihlman, supra;* Suth. Dam. (1884) pp. 414-416; and Sedg. Meas. Dam. (1891) Sec. 202.

The defendant offered upon the trial to prove that by an expenditure of $350 the plaintiff could have removed the dam, thus returning the water into the old channel immediately after the trespass, and have filled the excavation made upon his premises, thus restoring the premises to their former condition. It would have been for the jury to determine, in the light of all the facts in the case, whether or not such undertaking and expense would have been reasonable and within the means of the plaintiff. Of course, the plaintiff would not have been called upon to embarrass himself financially or to do anything unreasonable or unlawful in the premises. The evidence should have been admitted, and the plaintiff would then have had the opportunity to show, if he desired, that such undertaking on his part was not reasonably within his power or means to accomplish, and, if the jury believed that such was the case, then they would not have been warranted in finding that it was his duty to have taken these steps to restore his premises to their former condition and to prevent the increase of damages.

One is not, as a rule, expected to enter or go upon a third party's premises to save his own property from increased injury resulting from the wrong act of another. If the dam in question was on a vacant, uninclosed and unoccupied mining location, upon which and over which, by a well-known custom in this state, people are permitted to camp, go, travel and do other things not hurtful to the premises, it would not be unreasonable to expect an injured party to go upon such open land to prevent serious damage, in a great emergency.

The order of the district judge, purporting to give the railway company authority to enter the lands of the plaintiff, to do as it did do for the purpose of a right of way, was void. It

is not necessary for us to go into this at length. The order being void, the entry was a trespass, as is conceded by counsel.

The defendant upon the trial prayed the court to give the following instruction: "I further instruct you that after defendant had entered upon the land in question in the month of October, 1891, and dug a trench across the same, and changed the course of Belt creek, the plaintiff has the right to have the stream returned to its original channel, and could have compelled a return of the same. In considering the extent to which the land was depreciated in value, if at all, by this change, it is proper matter for your consideration that the change was not necessarily permanent in character, and that the plaintiff was under no obligation to let the stream remain in the new channel, although he might, if he saw fit, elect to let it stay there." In the light of what we have said herein, we hold that the refusal to give this instruction was error.

The court also declined to give the following instruction, asked for by the defendant: "The point at which the water was diverted from the original channel and the dam so constructed was not upon the land owned by plaintiff, but the same was vacant, unoccupied, uninclosed land; and it would not have been a trespass, in law, for the plaintiff, after the construction of said dam, for himself to have gone and removed the same, and turned the waters into the old channel of Belt creek, if he considered that his land would be seriously or substantially diminished in value by permitting the stream to remain in the new channel." While, under the uncontradicted evidence in the case as to the open and vacant character of the land where the dam was, the granting of the instruction might not, perhaps, have been error, it was not error to refuse to give it, as it contains a statement of an alleged fact which it was within the province of the jury to find or not, according as they may or may not have believed the witnesses upon the point.

The refusal of the court to give defendant's requested instruction numbered 13 is also assigned as error; but, as the principal point therein, to-wit, the question of plaintiff's right

to bring and maintain an action against the persons owning the land where the dam was located, to compel them to permit the restoration of the creek to the old bed, is not argued in the briefs, such alleged error will not be considered by us.

We come now to a consideration of the assignments of error as to admission of evidence of value. Plaintiff in his own behalf testified: "I understand that those lots were held at $450 below." Objection was made to the numerous interrogatories upon which the answer was based, the ground of objection being that the questions were immaterial and incompetent, and that no foundation was laid showing that the witness had any knowledge of the lots, and that there was no evidence that any lots were "platted there." Upon the court's inquiry, "In the vicinity of the land in question?" counsel for plaintiff answered, "Yes, sir," whereupon the court overruled the objection. There was no objection made to the interjection of the inquiry or answer. Examination of the record shows that the vice of pointing out to the jury places on the map, and asking questions about "property that is hereabout numbered 11 or 10, immediately west of it" on the map, which map was seen by the jury, was indulged in, fixing the locality of the lots said to be worth "$450 below." The testimony had a tendency to fix some value to the land, and, as the jury saw the map at the time that counsel was pointing out the ground in question, we cannot say that they did not understand the situation. While not approving this manner of introducing evidence, we cannot say that the court erred in letting it go to the jury for what it was worth.

The court erred in overruling defendant's objection to the introduction of the evidence of plaintiff and of witness Condon as to what had been offered them, respectively, by one Scott, said by the witnesses to be the right of way agent of defendant railway company, for the eighty-foot strip which was sought to be condemned. It appears that Scott offered them, respectively, $4,000 and $3,500 for the said strip. There is nothing to show that the right of way agent had any authority from any one

to make such offer, or that the company ever heard of the offer. It is certain that the company never adopted the offer or carried it out, for it abandoned the condemnation proceedings. The single case cited by counsel in support of the admission of the evidence is one in which one or more of the owners expressly told another person to "go ahead" and make a certain sale, thus establishing agency. This is a far different case from the one at bar as to agency.

The alleged error of the court in overruling defendant's objection to the question put to Condon as to instructions given him by Sweeney with respect to making the deed, and as to Sweeney having told Condon not to waive any damages, need not be considered, for the reason that there is nothing in the deed as to waiver of the damages sued for, and, further, this matter of waiver has been sufficiently covered herein.

Defendant objected to any evidence as to the value of the property for townsite purposes, on the ground that the property could not be considered as platted property or platted into lots, for the reason that it was not in fact platted, and that Madison street was not in fact extended through it at that time, and that the property was not capable of being platted and sold, owing to the fact that plaintiff did not then have title to it, as appears from the evidence, and that "plaintiff's right was only then a location notice upon which a receiver's receipt had not yet been issued," and that it was not the proper method of arriving at the value of the land to consider it in the light suggested by this question. The court overruled the objection. It does not appear that it was necessary for the city to extend Madison street in order that the land could be platted for townsite purposes. Why could not the owner have dedicated a street?

Witnesses who knew the property, and were familiar with the uses to which it could be put, could give their opinions as to the market value—and respondent was properly allowed to introduce evidence to prove the value of the land for town-lot purposes. He had the right to make such proof whether he had platted it or built upon it or not. The question was not to what

use the land had been put. The owner has a right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it could be used, whether or not he so used it. (*Montana Ry. Co.* v. *Warren,* 6 Mont. at page 284, 12 Pac. 641, and cases cited; *Northern Pac. & Montana Railway Co.* v. *Forbis,* 15 Mont. 452, 48 Am. St. Rep. 692, 39 Pac. 571.) Mining claims are real estate. (*Butte Hardware Co.* v. *Frank,* 25 Mont. 244, 65 Pac. 1.) From the evidence it appears that the federal government patented the land to plaintiff after an entry made in December, 1891, location having been made on January 1, 1891. The jury probably took into consideration the fact that plaintiff had not "proven up," but that he had "earned" the land, and had a right to a patent, as appears in evidence from the fact that the government issued the patent, which could not lawfully have issued if the owner had not earned it at least as early as November 1, 1891. Besides, he was the owner of the mining claim,—real estate, "property," in every sense of the word,—against all the world, while he was in possession, complying with the law, and performing the conditions precedent to the obtaining of his patent. He had the right to quit, but no one had the right to trespass upon or interfere with his possession, use or enjoyment of the premises, except by due process of law.

Having considered carefully the reasoning of present counsel for appellant in his brief bearing upon the question as to whether or not plaintiff waived his constitutional rights, and that the complaint in this cause does not state a cause of action, we must agree, without further remarks, with the former counsel for respondent, that the complaint does state a cause of action, and that the order was void, as we have hereinbefore stated.

The errors herein declared were prejudicial to defendant, and the order denying the motion for a new trial and the judgment must be reversed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE PIGOTT: I am inclined to the opinion that evidence of an offer to buy, made in good faith, is admissible in favor of the owner of property as tending to prove its value. But the testimony of the plaintiff and Condon touching supposed offers of purchase by the right of way agent was, I think, both hearsay and immaterial. The agent was not acting for himself but assumed to speak for the defendant; there was nothing tending to show authority in him to make any offer in defendant's behalf, and hence it did not appear that either offer was *bona fide*. Not being satisfied that the error in admitting it was without prejudice, I concur in the reversal.

I dissent from the holding that the plaintiff owed to the defendant the legal duty to mitigate damages or lessen the amount thereof by abating or removing the nuisance existing on the land of another.

As to the sufficiency of the complaint: No attack by demurrer or otherwise was made upon it in the court below, where the case was tried upon the theory that a cause of action was stated; the opening brief of counsel for the defendant confessed its sufficiency and expressly admitted that the order under which the defendant entered upon plaintiff's property was void, and not until the oral argument in this court did the defendant suggest that the order was only voidable. Under these circumstances I am of the opinion that the allegations of the complaint and the evidence should be liberally construed and every reasonable intendment indulged in favor of the plaintiff. So regarding the complaint and the evidence, I think the former states a cause of action and the latter supports it.

MEMORANDA

OF

DECISIONS RENDERED, WITHOUT WRITTEN OPINIONS, DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 1,321.—ROBINSON, Administratrix, Respondent, *v.* KLEINSCHMIDT, Appellant.

Appeal from District Court, Deer Lodge County.

On motion to dismiss appeal. Decided February 4, 1901.

Per Curiam.—Upon motion of the appellant this cause is dismissed.

Mr. W. H. Trippet, Messrs. Napton & Napton and *Mr. T. J. Walsh,* for Appellant.

No. 1,261.—YELVERTON, Respondent, *v.* SAWYER et al., Appellants.

Appeal from District Court, Deer Lodge County.

Motion to dismiss appeal submitted February 7, 1901. Decided February 7, 1901.

PER CURIAM.—Upon application of the appellants herein this appeal is dismissed at the cost of the appellants; and respondent's motion to assess damages for an appeal taken without merit is denied.

Mr. C. J. Walsh and *Messrs. McConnell & McConnell,* for Appellants. *Mr. J. R. Boarman,* for Respondent.

No. 1,405.—FERRIS, APPELLANT, *v.* MATTHEWS, RESPONDENT.

Appeal from District Court, Cascade County.

Decided February 11, 1901.

PER CURIAM.—This appeal is dismissed as per stipulation on file herein.

Mr. J. A. Largent, for Appellant.

No. 1,654.—IN RE W. W. LIKENS.

Original proceeding in disbarment.

Order entered February 12, 1901.

PER CURIAM.—Whereas, the Chief Justice of this court has received a communication from Honorable William Clancy as Judge of the Second Judicial District, that W. W. Likens, an attorney of this court, who is now residing and practicing law at the city of Butte, in said district, is an ex-convict from the state of Colorado, and was such at the time he was licensed by

this court about one year ago: *it is ordered,* that said communication be filed with the clerk of this court, and that said clerk be directed to inform the said Clancy that proper action will be taken in the premises upon the filing in this court of charges against the said Likens.

Accusation filed February 21, 1901.

Order to show cause entered February 26, 1901.

PER CURIAM.—Accusation having been filed in this court against W. W. Likens, a member of the bar of this state, it is this day ordered that the said W. W. Likens appear before this court on the first day of April, A. D. 1901, at 10 o'clock a. m., and show cause why his name should not be stricken from the Roll Book; and it is further ordered, that a copy of the accusation and of this order be served on the said Likens at least five days before the said first day of April.

[Service of the above order was never made upon the said W. W. Likens, for the reason that, upon the instituting of this proceeding, he departed from the state of Montana to parts unknown.—O. T. C.]

NOS. 1,470 AND 1,471.—WHITCRAFT ET AL., APPELLANTS, *v.* HENDRICKS, RESPONDENT.

Appeal from District Court, Deer Lodge County.

Motion to dismiss appeals. Decided February 15, 1901.

PER CURIAM.—Appellants' motion to dismiss these appeals is granted, and the said appeals are hereby dismissed at the cost of appellant.

Mr. Edward Scharnikow and *Messrs. Toole, Bach & Toole,* for Appellants.

NOS. 1,645 AND 1,646.—STATE EX REL. BOSTON & MONTANA CONSOL. C. & S. MINING CO., RELATOR, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, DEFENDANT.

Alternative writ of mandate issued January 24, 1901. Motion to tax costs submitted February 15, 1901. Decided February 16, 1901.

PER CURIAM.—It appearing from the original and supplemental answers made to the alternative writs of mandate heretofore issued herein that the defendant has fully complied with the requirements of said writs in both hearing and determining the matters which it was sought by said writs to have heard and determined, but that no sufficient or any excuse is furnished why said matters were not heard and determined before the said writs were applied for and issued; it is ordered that the writs be discharged at the cost of the defendant.

Messrs. Forbis & Evans, for Relator. *Mr. J. M. Denny,* for Defendant.

NO. 1,263.—KLEINSCHMIDT & BROTHERS, CONSOLIDATED, RESPONDENT, *v.* LONGMAID, APPELLANT.

Appeal from District Court, Lewis and Clarke County.

Motion to dismiss appeal. Decided February 25, 1901.

PER CURIAM.—This appeal is dismissed on motion of the appellant.

Messrs. McConnell & McConnell, for Appellant.

No. 1,267.—DONOVAN, RESPONDENT, *v.* AMMON ET AL., APPELLANTS.

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Appeal from District Court, Cascade County.

Motion to dismiss appeal. Decided February 27, 1901.

PER CURIAM.—Upon motion of the respondent herein this appeal is dismissed at the cost of appellants.

(MR. JUSTICE PIGOTT, having been of counsel and being disqualified herein, takes no part in the making of this order.)

Mr. Ransom Cooper, for Appellants.

No. 1,609.—WADSWORTH, EXECUTRIX, RESPONDENT, *v.* SINGER MANUFACTURING CO., APPELLANT.

Appeal from District Court, Silver Bow County.

Motion to dismiss appeal submitted October 17, 1900. Denied October 18, 1900. Motion to vacate and set aside the order heretofore made herein denying the motion to dismiss and for a rehearing of the motion, submitted December 18, 1900. Granted December 24, 1900. Motion to dismiss the appeal submitted January 11, 1901. Decided January 11, 1901.

PER CURIAM.—Dismissed upon the ground that the appellant has been guilty of negligence in failing to file the transcript within the time prescribed by the rules of this court (Mr. Justice Pigott dissenting); the charge made by the respondent that the appellant practiced imposition upon the court at the

time of the hearing of the original motion is not sustained by the proof.

Mr. L. J. Hamilton and *Mr. B. S. Thresher,* for Appellant. *Messrs. Sinclair & Dygert,* for Respondent.

No. 1,333.—LAKE, APPELLANT, *v.* LAKE, RESPONDENT.

Appeal from District Court, Silver Bow County.

Motion to dismiss appeal. Decided January 18, 1901.

PER CURIAM.—Upon application of the appellant herein this cause is dismissed at the cost of appellant.

Mr. M. D. Leehey, for Appellant.

No. 1,658.—WETZSTEIN, RESPONDENT, *v.* BOSTON & MONTANA CONSOL. C. & S. MINING CO., APPELLANT.

Appeal from District Court, Silver Bow County.

Motion to dismiss appeal. Decided March 14, 1901.

PER CURIAM.—Appellant's motion to dismiss this appeal is granted, and the appeal is hereby dismissed at the cost of the appellant.

Messrs. Forbis & Evans, for Appellant. *Messrs. McHatton & Cotter* and *Mr. James M. Denny,* for Respondent.

No. 1,309.—HAGGIN, APPELLANT, *v.* LORENZE ET AL., RESPONDENTS.

Appeal from District Court, Deer Lodge County.

Order entered March 14, 1901.

PER CURIAM.—It is ordered that the request for an order dismissing the appeal be not considered, for the reason that no proper motion in that behalf has been filed or made, and for the further reason that the request is not signed or made by counsel of record herein.

(MR. CHIEF JUSTICE BRANTLY, having been of counsel, does not participate in the foregoing order.)

Motion to dismiss appeal. Decided March 16, 1901.

PER CURIAM.—Appellant's motion to dismiss this appeal is granted, and the appeal is hereby dismissed at the cost of the appellant.

(MR. CHIEF JUSTICE BRANTLY, having been of counsel in the court below, does not participate in the foregoing order.)

Mr. G. B. Winston and *Mr. W. W. Dixon,* for Appellant.

No. 1,667.—STATE EX REL. ANACONDA COPPER MINING CO., RELATOR, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., DEFENDANTS.

Original application for writ of supervisory control. Decided April 25, 1901.

PER CURIAM.—It appearing herein from the answer made by Honorable William Clancy, Judge of the Second Judicial District Court, to the order to show cause, heretofore issued herein, that said court has granted to the relator all the relief sought by its application to this court, it is ordered that relator's application be dismissed at its own cost.

(MR. JUSTICE PIGOTT dissents from the part of the foregoing order directing the cost of the application to be paid by relator.)

Mr. W. W. Dixon, Mr. A. J. Shores and *Mr. C. F. Kelly,* for Relator. *Messrs. McHatton & Cotter,* for Defendants.

No. 1,671.—WETZSTEIN, RESPONDENT, *v.* BOSTON & MONTANA CONSOL. C. & S. MINING CO., APPELLANT.

Appeal from District Court, Silver Bow County.

Application of appellant for an order staying the injunction order appealed from and all proceedings thereunder pending appeal, and motion of respondent to dismiss the petition of the appellant. Decided April 25, 1901.

PER CURIAM.—It is ordered that the motion of the respondent be and the same is hereby granted and that the application of the appellant be and is hereby dismissed, upon the ground that the granting of the relief sought by the petition is not necessary or proper to the complete exercise of the appellate jurisdiction of the supreme court.

(MR. CHIEF JUSTICE BRANTLY dissents.)

Messrs. Forbis & Evans, for Appellant. *Messrs. McHatton & Cotter, Messrs. Toole & Bach, Mr. James M. Denny* and *Mr. Robert B. Smith,* for Respondent.

No. 1,338.—WHITE, APPELLANT, *v.* KERN, RESPONDENT.

Appeal from District Court, Custer County.

Decided May 16, 1901.

PER CURIAM.—This cause having been set for hearing this day, and no briefs having been filed and no one appearing to present the matter orally to the court, the judgment appealed from is affirmed.

Mr. C. B. Nolan, for Appellant.

No. 1,629.—MONTANA ORE PURCHASING CO. ET AL., RESPONDENTS, *v.* BOSTON & MONTANA CONSOL. COPPER & SILVER MINING CO., APPELLANT.

Appeal from District Court, Silver Bow County.

Application by appellant for a writ of *supersedeas.* Decided May 6, 1901.

PER CURIAM.—Dismissed, for the reason that the application alleges grounds which, if they entitle the appellant to any relief, should be addressed to the district court in the first instance.

Rehearing denied, May 18, 1901.

Messrs. Forbis & Evans, Mr. William Scallon, Mr. Thos. Patterson and *Mr. Wm. H. DeWitt,* for Appellant. *Messrs. McHatton & Cotter,* for Respondents.

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No. 1,201.—IN RE WILLIAM NEWTON.

Original proceeding in disbarment.

Order of disbarment entered January 11, 1898. Motion to vacate disbarment order, filed June 27, 1901. Motion denied. PER CURIAM.

No. 1,691.—BOE, APPELLANT, *v.* McDONALD ET AL., RESPONDENTS.

Appeal from District Court, Flathead County.

Motion to dismiss appeal. Decided July 15, 1901.

Motion granted. PER CURIAM.

Messrs. Foote & Pomeroy, for Respondents.

No. 1,682.—STATE EX REL. ANACONDA COPPER MINING CO. ET AL., RELATORS, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

Original application for a writ of supervisory control. Writ granted August 1, 1901 (see opinion *ante,* page 504).

On August 3,1901, the court made an addition to the order made herein on August 1, 1901, as follows, to-wit:

"The said writ shall be served by the marshal of this court in the same manner as a summons is served in civil cases, and the judge of the district court shall make return to this court within ten days from the date of service thereof showing his action in the premises."

On August 5, 1901, the court made the following order herein:

"The writ heretofore ordered issued and served herein shall be in the following form, to-wit:

IN THE SUPREME COURT OF THE STATE OF MONTANA.

The State of Montana ex rel. Anaconda Copper Mining Company, and Washoe Copper Company,

Relators,

vs.

The Second Judicial District Court of the State of Montana, in and for the County of Silver Bow, and Honorable William Clancy, the Judge thereof,

Respondents. . .

WRIT OF SUPERVISORY CONTROL.

The State of Montana to the Second Judicial District Court, and to the Honorable William Clancy, the Judge thereof,

Greeting:

WHEREAS, it has been made to appear to us, upon a full consideration of the matters involved in the application of the above-named relators to this court for a writ of supervisory control, that on the 20th day of May, A. D. 1901, you, the said William Clancy, in that certain cause, numbered 8,315, entitled 'Burdette O'Connor *versus* Anaconda Copper Mining Company, and Washoe Copper Company,' then pending before the said court, issued an order for survey, directing the above-named relators to permit an inspection, examination and survey of all and of each and every of the shafts, cross-cuts, levels, stopes, winzes and underground workings in the Anaconda lode mining claim, United States Lot Number 92, the St. Lawrence lode mining claim, United States Lot Number 64, the Never Sweat

lode mining claim, United States Lot Number 51, the Rob Roy lode mining claim, United States Lot Number 147, the Grant lode mining claim, United States Lot Number 119, the Grant Extension, United States Lot Number 146, the Parrot lode mining claim, United States Lot Number 456, and the Cuerpo Bazzo lode mining claim, United States Lot Number 198, in Summit Valley Mining District, Silver Bow County, State of Montana; and also all the shafts, cross-cuts, drifts, levels, stopes, winzes and underground workings upon and within that certain placer claim commonly known and designated as the 'Leggat & Foster' placer mining claim, situated in the aforesaid mining district; also an examination, inspection and survey of all the veins and ores exposed in the said shafts and underground workings, giving to plaintiff in said suit the right to so survey and inspect all of the above-named mining claims and workings for a period of forty days, by certain persons designated by him; and further commanding the above-named relators to furnish to the persons so designated by plaintiff, all means of ingress to and egress from said premises; and,

WHEREAS, it has been made to appear to us that the above order of inspection and survey, made as aforesaid, was issued under a mistake of law and will, unless vacated and set aside, work gross and irreparable wrong and injustice to the relators, there being no remedy save by means of a writ of supervisory control,

NOW, THEREFORE, the case being exigent, WE DO COMMAND you that immediately upon the receipt of this writ, you do annul, vacate and set aside the said order of inspection and survey, so granted as aforesaid on the said 20th day of May, A. D. 1901; and of this writ and what you have done thereunder make due return within ten days after the service thereof.

WITNESS, Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana, and the Seal of the Court, this 5th day of August, A. D. 1901.

HENRY G. RICKERTS,

[SEAL] Clerk."

APPENDIX.

IN MEMORIAM.

STEPHEN DE WOLFE.

In the Supreme Court of the State of Montana, Twenty-fifth day of October Term, Thursday, October 31, 1901.

[Order of Court.]

This day the death of Stephen DeWolfe, Esquire, is suggested to the court by Harry D. Moore, Esquire, and the court thereupon appointed a committee consisting of N. W. McConnell, Esquire, T. C. Bach, Esquire, and Henry N. Blake, Esquire, to prepare resolutions and report them to the court on Monday, November 4, 1901, at 10 a. m.

Twenty-seventh day of October Term, Monday, November 4, 1901.

[Copy of Record.]

The committee heretofore appointed to draft resolutions on the death of Stephen De Wolfe, this day report as follows:

May it please the Court:—Your committee of the bar, appointed by an order entered in the records of the court to recommend appropriate action regarding the death of Stephen DeWolfe, late an associate justice of the supreme court of the territory of Montana, who departed this life on the twenty-seventh day of October, 1901, at Denver, state of Colorado, respectfully submit the following report for your consideration, and move that the same be adopted and spread upon the records:

Stephen DeWolfe was born in March, 1833, in Hawkins county, state of Tennessee. He received a liberal education and was graduated at the Lebanon law school, of Cumberland university, in 1857. He became a citizen of Salt Lake City, Utah, in 1859, and as an editor of The Valley Tan displayed rare courage in refusing to comply with the demands of the aggressive and despotic leaders of the Mormon church. In 1867 he acted as the United States attorney for Utah, and continued in the practice of his profession in that territory until 1879, when he opened his office in the city of Butte.

He was elected a member of the house of representatives of the Twelfth legislative assembly of Montana, and also of the council of the Fourteenth legislative assembly. In answer to the petitions of the residents of the Second judicial district, regardless of partisan bias, he was appointed by President Cleveland an associate justice of the supreme court of the territory, and entered upon the discharge of his duties on the twenty-eighth day of January, 1888, and remained upon the bench until the admission of Montana into the Union upon the eighth day of November, 1889.

In 1886 he was appointed city attorney of Butte, and served during the term of two years.

Therefore, be it resolved, That we cherish with profound esteem the memory of Stephen DeWolfe, as a brother learned in our profession and possessing the gift of eloquence in expounding the principles of the law; as a citizen who was patriotic and high-minded, and evinced upon every occasion a deep interest in the welfare of the community; as a servant of the people, who performed with fidelity and integrity all responsible tasks that were imposed upon him; and as a man, who labored diligently and faithfully for a score of years in building and guarding this commonwealth.

Resolved, That Stephen DeWolfe, throughout his career as an officer in the temple of justice was a model of courtesy upon the bench in his treatment of attorneys and all who were brought in contact with him; he was patient and impartial in the trial of causes pending in his tribunal; he was painstaking in his efforts to weigh the evidence and apply sound rules for detecting error and establishing truth; and in his opinions pronounced in this hall he was inspired by the desire to redress wrongs and protect rights, and deal justly with all and injure none.

Resolved, That we tender our sympathy to Miss Louise DeWolfe, the sister of the deceased, who by this severe affliction has lost an affectionate brother, whose chief delight was to make her home a scene of perpetual happiness.

Resolved, That the clerk of this court be directed to transmit a copy of these resolutions to Miss Louise DeWolfe.

N. W. McCONNELL,
HENRY N BLAKE,
THOMAS C. BACH,
Committee.

Whereupon, MR. CHIEF JUSTICE BRANTLY, speaking for the court, said:

We heartily concur in the expressions set forth in the resolutions and adopt the recommendations therein contained. The clerk is directed to spread them on the records of this court as recommended by the committee, and it is ordered that they be printed in Volume XXV of the opinions of this court. It is further ordered that the court do now adjourn until 10 o'clock tomorrow morning as a mark of respect to the memory of Stephen DeWolfe.

INDEX.

APPEAL.

See RULES OF SUPREME COURT.

Pleading—Demurrer.

1. Defendant rightly demurred on the ground that two causes of action had been improperly united in the complaint; the court, at the instance of the plaintiff, without objection by the defendant, dismissed the complaint as to the second cause of action, and at the same time overruled the demurrer, and no costs were taxed to defendant. *Held,* that the overruling of the demurrer, when considered with the dismissal, did not affect any substantial right of the defendant, and hence, under Section 778 of the Code of Civil Procedure, the judgment would not be reversed.—*Caplice Commercial Co.* v. *Cassidy,* 81.

Injunction *Pendente Lite.*

2. Before final decision on appeal from a decree finding plaintiff was not the owner of any interest in certain mining property, it was not an abuse of discretion for the trial court to refuse to grant said plaintiff an injunction *pendente lite* against the original defendant's successor in interest in a subsequent action, in the same court, wherein plaintiff's claim of title was identical with that of the original suit.—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.,* 85.

Record on Appeal

3. Where a record on appeal contains much matter impertinent and immaterial, the party offending in this particular will be subject to the payment of costs.—*Heinze* v. *Kleinschmidt,* 89.

Reversal—Directing Judgment on Remand.

4. Where the trial court erred in denying a motion to direct a verdict for defendant, the court on appeal could not direct judgment for the defendant, since they could not know what exceptions, if any, were taken by the respondent to the trial court's rulings on the evidence offered.—*Nolan* v. *Montana Central Ry. Co.,* 107.

Exceptions.

5. The only exceptions properly included in a transcript on appeal are those of appellant.—*Nolan* v. *Montana Central Ry. Co.,* 107.

Temporary Restraining Order.

5. Code of Civil Procedure, Section 1722, as amended February 28, 1899, provides that an appeal may be taken from an order granting or dissolving an injunction or refusing to grant or dissolve an injunction. *Held,* that the Supreme Court has no jurisdiction to grant an order of *supersedeas* to stay a temporary restraining order pending the hearing of an order to show cause why an injunction should not be issued, as there is no appeal from a temporary restraining order. (MR. JUSTICE PIGOTT dissenting.)—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.,* 135.

Stare Decisis.

6. In matters of practice the rule of *stare decisis* does not control, as it is proper to establish a correct and legal practice, if error has been committed in a former opinion of the court, provided it is apparent that no substantial injury will be suffered by litigants by reason of reliance upon the precedent.—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.*, 135.

Injunction *Pendente Lite*—Mining Claims—Extralateral Rights.

7. Where the owner of a mining claim sought to restrain the owner of a neighboring claim from removing ore from beneath the surface of plaintiff's claim, and the issue was as to the course of defendant's vein across his claim, and the evidence was conflicting, *held*, that the granting by the lower court, after a hearing, of an injunction *pendente lite*—being so largely a matter of discretion, would be sustained upon appeal, there being substantial evidence tending directly to support plaintiff's contention as to the strike of the vein.—*Parrot Silver & Copper Co.* v. *Heinze*, 139.

Preliminary Injunction.

8. The granting of a preliminary injunction will be sustained upon appeal where there has been a reasonable showing made in support of the application in the court below.—*Parrot Silver & Copper Co.* v. *Heinze*, 139.

New Trial—Appeal—Transcript.

9. Where, on appeal from an order granting a new trial, there was inserted in the transcript a copy of the notice of intention to move for a new trial, the notice not being made a part of any bill of exceptions or statement of the case on motion for a new trial, nor a constituent part of the judgment roll, as defined in Code of Civil Procedure, Sec. 1196, or in the absence of a bill of exceptions or statement on motion for a new trial containing it, one of the papers required by Sections 1176, 1738, to be furnished to the appellate court, it will be stricken from the transcript.—*Carr, Ryder & Adams Co.* v. *Closser*, 149.

Jurisdiction—Dismissal.

10. Under Code of Civil Procedure, Sec. 1723, Subd. 2, which provides that an appeal may be taken to the supreme court within 90 days after the entry of a judgment of a district court on appeal from an inferior court, an appeal from a judgment of a district court rendered on an appeal from a justice's court, if not taken within 90 days after its entry, will be dismissed for want of jurisdiction.—*Morris* v. *McLaughlin*, 151.

Waiver of Errors.

11. Where errors specified were not argued or referred to in the brief on appeal, they are waived.—*Maloney* v. *King*, 188.

Injunction—Appeal—Review.

12. Unless it clearly appears from a consideration of all the evidence that the court *a quo* abused its discretion in granting an injunction *ad litem* its order must, on appeal, be affirmed.—*Maloney* v. *King*, 188.

Directed Verdict—Evidence—Review.

13. The truth of plaintiff's evidence is to be assumed, and it is to be regarded in the most favorable light on a motion to direct a verdict for defendant.—*Freeman* v. *Sand Coulee Coal Co.*, 194.

Rules of District Courts.

14. Reasonable rules of the district courts, when made and published, are part of the law of the land so far as procedure in such courts is concerned,

and so far as the supreme court is concerned in passing upon the action of such courts in relation thereto.—*State ex rel. King* v. *District Court,* 202.

Record—Evidence—Stenographer's Certificate—Stipulation of Counsel.

15. Under the provisions of the Code of Civil Procedure of 1895, neither the certificate of the court stenographer nor the stipulation of counsel can perform the office of the certificate of the judge to preserve and authenticate the evidence for the purposes of an appeal.—*Conklin* v. *Cullen,* 214.

Record—Evidence—Authentication.

16. Under Code of Civil Procedure, Secs. 1736, 1196, the evidence heard at the trial is no part of the judgment roll so as to be included in the record on appeal, unless incorporated in a bill of exceptions or statement settled by the judge or referee before whom the trial takes place, hence a copy of the stenographer's report of evidence, not included in any bill of exceptions or statement settled by the judge, identified merely by the stenographer's certificate, and accompanied by a stipulation of counsel that such statement contains all the evidence, but without waiver of any right to object to the evidence as not being a part of the record, must be stricken from the record on motion, as it could only be made a part of the record under Code of Civil Procedure, Secs. 1150-1158, relating to the making of bills of exceptions, or under Secs. 1170-1176, providing the method for obtaining a new trial.—*Conklin* v. *Cullen,* 214.

Specification of Errors—Review.

17. Where, on appeal, the plaintiff contended that the evidence did not support the finding as to a sum due defendant, and the objection in the record was made as to a certain finding, which disclosed that the jury in that finding did not undertake in any way to determine the amount due defendant, the appellate court could not review the matter.—*Murray* v. *Haldorn,* 218.

Weight of Evidence—Credibility of Witnesses—Review.

18. With questions of the mere weight of evidence in substantial conflict and the comparative credibility of witnesses the supreme court, as an appellate tribunal, has nothing to do.—*Chicago Title & Trust Co.* v. *O'Marr,* 242.

Temporary Restraining Order.

19. Code of Civil Procedure, Sec. 1722, as amended February 28, 1899, providing that an appeal may be taken from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, does not authorize an appeal from a temporary restraining order pending the hearing of an order to show cause why an injunction *pendente lite* should not be issued.—*Maloney* v. *King,* 236.

Bill of Exceptions—Amendments.

20. Where proposed amendments of a bill of exceptions, which were allowed, were not incorporated in the bill, but only appeared in the transcript, they cannot be considered on appeal, since they are not part of the record.—*Yellowstone Nat'l Bank of Billings* v. *Gagnon,* 268.

Bill of Exceptions—Amendments.

21. Where proposed amendments to a bill of exceptions, which were allowed by the court, were not incorporated therein, such bill of exceptions will be disregarded on appeal, since the proposed bill and amendments were both necessary to constitute a bill of exceptions.—*Yellowstone Nat'l Bank of Billings* v. *Gagnon,* 268.

Pleadings—Law of the Case.

22. Where, on a prior appeal, defendant's answer was held to state a defense, plaintiff cannot subsequently raise the question that it does not.—*Yellowstone Nat'l Bank of Billings* v. *Gagnon,* 268.

Findings—Implied Findings—Exceptions—Review.

23. In the absence of a compliance with the requirements of Secs. 1114, 1115 of the Code of Civil Procedure, a judgment will not be reversed on appeal though the express findings do not support it, since in such case the presumption obtains that the court impliedly found for the prevailing party upon the issues of fact not covered by the express findings.—*Yellowstone Nat'l Bank of Billings* v. *Gagnon,* 268.

Evidence—Review.

24. Where there is no bill of exceptions (or new trial statement) on appeal, the evidence cannot be examined to ascertain whether it tended to prove the facts found or warranted the court's decision.—*Yellowstone Nat'l Bank of Billings* v. *Gagnon,* 268.

Reversal—Remand.

25. Upon the reversal of a judgment the supreme court will remand the cause for a new trial.—*Sherman* v. *Nason,* 283.

Exceptions.

26. The only exceptions which may be considered on appeal are those preserved by the appellant.—*Sherman* v. *Nason,* 283.

Limiting the Rights of Cross-Examination.

27. Errors of the trial court in limiting the rights of cross-examination are cured by the subsequent admission of the evidence thus sought to be brought out.—*Kipp* v. *Silverman,* 296.

Record on Appeal—Exhibits—Printed Matter.

28. Under Supreme Court Rule VIII, Sec. 1, providing that any printed matter introduced in evidence in the trial court may be made a part of the record on appeal by being authenticated by a certificate of the trial judge, printed matter so introduced in evidence will not be considered on appeal unless certified to by the trial court.—*Stevens* v. *Ravalli County,* 306.

Record on Appeal—Printed Exhibits—Evidence—Review.

29. Where certain printed exhibits, material to the determination of a cause, are not in the record on appeal, the findings of fact of the trial court will not be reviewed, since all the evidence is not before the court.—*Stevens* v. *Ravalli County,* 306.

Pleading—Waiver.

30. An objection to a replication denying the "material" allegations of the answer, not taken in the trial court, is waived on appeal.—*Burke* v. *Inter-State S. & L. Association,* 315.

Record on Appeal—Amendments to Pleadings—Review.

31. Where the record on appeal does not show what amendment, if any, was made to the complaint, error in allowing it will not be considered.—*Anderson* v. *Cook,* 330.

Findings—Conflict of Evidence—Review.

32. Where the evidence is conflicting, the findings of the trial court will not be disturbed on appeal.—*Anderson* v. *Cook,* 330.

Assignments of Error—Briefs—Waiver.

33. Where assignments of error are not mentioned in the brief of appellant, they will be considered as waived.—*Anderson* v. *Cook,* 330.

Failure to File Brief—Affirmance.

34. Where no brief is filed and submitted to the appellate court, nor any oral argument made pointing out any of the matters on which appellants rely for relief, the judgment will be affirmed.—*Mendenhall* v. *Lyon,* 343.

Demurrer.

35. If the act of the trial court in sustaining a demurrer was right, such act must, on appeal, be sustained, notwithstanding the trial court may have, in sustaining the demurrer, done so for a wrong reason.—*Butte Hardware Co.* v. *Frank,* 344.

Substantial Defect in Complaint—Affirmance.

36. A judgment may be affirmed for a substantial defect in the complaint, although counsel in their briefs and arguments are silent as to such defect (MR. JUSTICE PIGOTT dissenting).—*Butte Hardware Co.* v. *Frank,* 344.

Appealable Order.

37. Under Code of Civil Procedure, Sec. 1722, Subd. 2, providing that appeals may be taken to the supreme court from any special order made after final judgment, an order striking out the statement on motion for a new trial is appealable.—*Beach* v. *Spokane R. & W. Co.,* 367.

New Trial Statement—Service—Presumption.

38. Where a statement on motion for a new trial has been allowed and settled by the trial court, the appellate court will presume, in the absence of evidence to the contrary, that it was duly served on the adverse party; but this presumption does not obtain where the statement or bill upon its face shows that the service was made too late, and that seasonable objection to it was interposed upon that ground.—*Beach* v. *Spokane R. & W. Co.,* 367.

New Trial Statement—Striking Out.

39. A statement on motion for a new trial which has been settled, certified and filed cannot be stricken from the record or files on the ground that the draft of the statement was not served in time.—*Beach* v. *Spokane R. & W. Co.,* 367.

Judgment Roll—Bill of Exceptions.

40. Where plaintiff's bill of exceptions was made up entirely of matters occurring after the entry of final judgment, it was no part of the judgment roll, and hence would not be considered on defendant's appeal from an order denying a new trial.—*Beach* v. *Spokane R. & W. Co.,* 367.

New Trial Statement—Settlement—Objections.

41. Objections to the settlement of a statement on motion for a new trial must be incorporated in the statement, to form part of the record on appeal from the order denying a new trial.—*Beach* v. *Spokane R. & W. Co.,* 367.

New Trial Statement—Striking Out.

42. Where a statement on motion for a new trial was erroneously stricken from the record by the trial court, such proceeding would vitiate the order denying a new trial, since the motion therefor rested on the statement.—*Beach* v. *Spokane R. & W. Co.,* 367.

New Trial—Affidavits—Record on Appeal.

43. Where application for a new trial is made upon affidavits, objections to the untimely service of the affidavits must be incorporated into the bill of exceptions; but under Code of Civil Procedure, Sections 1176, 1738 and 1739, the affidavits need not be presented by a bill of exceptions if the attorneys certify to the copies furnished on appeal to the supreme court.—*Beach* v. *Spokane R. & W. Co.*, 367.

Findings—Review.

44. Where allegations touching laches, the statute of limitations, and estoppel were denied by the replication, but the evidence was not preserved in the record, the trial court's findings on these questions will not be disturbed on appeal.—*Beach* v. *Spokane R. & W. Co.*, 379.

Contradictory Instructions—New Trial.

45. Where instructions are upon a material point, and are in conflict, a new trial will be granted, unless it also appears that the appellant has suffered no prejudice.—*Robinson* v. *Mills*, 391.

Contradictory Instructions—New Trial.

46. Where conflicting instructions are upon an immaterial point, and it is not reasonably apparent that the jury have been misled, a new trial will not be granted.—*Robinson* v. *Mills*, 391.

Contradictory Instructions—Receiver's Liability.

47. Where a receiver is appointed for a water company which has negligently failed to properly fill an excavation made in the street, and suit is brought against the receiver for an injury resulting therefrom, after his appointment, error in contradictory instructions, some of which state his liability as dependent on notice and others as being absolute, does not authorize the reversal of a judgment for plaintiff, since the liability is not dependent on notice, and it is immaterial whether the question of notice was considered by the jury.—*Robinson* v. *Mills*, 391.

Instructions—Appeal—Review.

48. Where in an instruction the court inadvertently uses expressions which assume the existence of a fact in issue, but, taking the whole charge together, it does not appear that the appellant has suffered prejudice thereby, such instruction will not work a reversal of the judgment.—*Leonard* v. *City of Butte*, 410.

Injunction *Pendente Lite*.

49. Where, on an application for an injunction *pendente lite* to restrain defendants from obstructing a private road which plaintiff claims by prescription, the evidence is conflicting, the finding of the trial court that such right has not been acquired, and order denying an injunction, should be affirmed.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consol. Mining Co.*, 427.

Injunction—Evidence—Presumption.

50. Where, on an application for an injunction to restrain the obstruction of a road, the trial court admitted irrelevant evidence, its order should not be reversed on that ground, if there was sufficient competent evidence to sustain its findings, since it will be presumed that its decision was based on such competent evidence.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consol. Mining Co.*, 427.

Statement on Motion for New Trial—Appeal from Judgment.

51. Code of Civil Procedure, Sec. 1736, enacts that any statement used on a motion for new trial may be used on appeal from a final judgment, equally as upon appeal from the order granting or refusing a new trial. *Held,* that a statement on a motion for a new trial cannot render the question whether or not the evidence was of sufficient weight to sustain the decision of the court or the verdict of the jury reviewable on appeal from the judgment, since such question could only be reviewed on appeal from an order granting or denying a motion for a new trial.—*Withers* v. *Kemper et al.,* 432.

Statement on Motion for New Trial—Appeal from Judgment—Review.

52. On an appeal from the judgment the supreme court cannot consider any questions raised in a statement on motion for a new trial which it could not consider on a bill of exceptions regularly in the record on appeal from such judgment.—*Withers* v. *Kemper et al.,* 432.

Bill of Exceptions—Presumption.

53. It is presumed upon appeal from a judgment that the court has passed upon all the points raised by the bill of exceptions.—*Withers* v. *Kemper et al.,* 432.

Errors of Law.

54. To attack a judgment as not supported by the findings is to raise a question of law.—*Withers* v. *Kemper et al.,* 432.

Errors of Law.

55. To attack a decision on the ground that there was a total failure of any evidence is to raise a point of law.—*Withers* v. *Kemper et al.,* 432.

Damages—Verdict—Review.

56. In a proceeding to condemn a right of way, the verdict assessing the damages will not be set aside, the evidence being conflicting, and there being sufficient to support the verdict.—*Helena & Livingston S. & R. Co.* v. *Lynch,* 497.

Instructions—Omissions—Review.

57. Under Code of Civil Procedure, Sec. 1080, Subd. 7, requiring a party desiring special instructions to reduce them to writing, and to request the court to so instruct, alleged errors in omitting to charge on certain points will not be considered in the absence of such a request.—*Helena & Livingston S. & R. Co.* v. *Lynch,* 497.

Former Appeal—Law of the Case.

58. Where, in the opinion on a former appeal, the court said that they would treat only those points which appellant had taken up on his oral argument, and closed with the remark that "we have considered and treated all the errors assigned which we consider material," such decision should not be deemed as determining any questions in the case other than those discussed in the opinion.—*Sweeney* v. *Montana Central Ry. Co.,* 543.

Refusal of Requested Instruction—Review.

59. It is not error for the court to refuse to give a requested instruction which contains a statement of an alleged fact which it is within the province of the jury to find or not, according as they may or may not believe the witnesses upon the point.—*Sweeney* v. *Montana Central Ry. Co.,* 543.

Assigned Errors—Briefs.

60. An assigned error which is not argued in the briefs will not be considered.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

Failure to File Transcript—Dismissal.

61. Where appellant has been guilty of negligence in failing to file the transcript within the time prescribed by the rules of the supreme court, the appeal will be dismissed.—*Wadsworth* v. *Singer Manufacturing Co.*, 567.

Motion to Dismiss Appeal.

62. Where application for an order dismissing an appeal is not signed by counsel of record, the application will not be considered.—*Haggin* v. *Lorenze*, 569.

Stay Pending Appeal.—Injunction.

63. Application for an order staying the injunction order appealed from and all proceedings thereunder pending the appeal, will be dismissed where the stay is not necessary or proper to the complete exercise of the appellate jurisdiction of the supreme court.—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.*, 570.

Failure to File Briefs.

64. Where an appeal has been set for hearing and no briefs have been filed and no one appears to present the matter orally to the court, the judgment appealed from will be affirmed.—*White* v. *Kern*, 571.

ATTORNEY.

Petition for the Reinstatement of a Disbarred Attorney.

The mere petition of attorneys and others for the reinstatement of a disbarred attorney will not be considered, such attorney not being before the court in person or by petition by him subscribed, asking for reinstatement, and giving his reasons therefor.—*In re Wellcome*, 131.

ASSUMPSIT.

See BANKS AND BANKING.

BANKS AND BANKING.

Special Deposit—Action for Money Had and Received—Promise for Benefit of Third Person—Enforcement—Voluntary Trust—Executory Contracts.

Plaintiffs agreed to sell a mine to M., and the deeds were placed in escrow in the defendant bank until payment of $47,000 as a balance of the purchase price. M. sold the mine to Scottish purchasers, and the seventh paragraph of the contract provided that £20,000 should be deposited with the defendant bank to pay plaintiffs the balance of the purchase price in full, and other charges against the mine, and that amount and a copy of the contract were forwarded to the bank, and the cashier's attention was called to the seventh paragraph. Plaintiffs, without knowledge of such contract, agreed to deliver the deeds on receipt of $22,000 in cash out of the first payment by the foreign purchasers, and to accept M.'s notes for the balance until the second payment. Defendant, without informing plaintiffs of the provisions of the contract between M. and the foreign purchasers, paid plaintiffs $22,000. The foreign purchasers never made any further payments. *Held*, that plaintiffs were not entitled to recover the balance of the purchase price from defendant as money had and received to and for the use of the plaintiffs.

Defendant's acceptance of the funds did not constitute an implied promise to the foreign purchasers for the benefit of plaintiffs that the defendant would pay the plaintiffs the balance of the purchase price in full.
The deposit did not create a voluntary trust in favor of the plaintiffs as beneficiaries, under Civil Code, Sec. 2951, defining a voluntary trust as an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another, and Section 2956, declaring that a volutary trust is created as to the trustor and beneficiary by any words or acts of the trustor intending with reasonable certainty and intention on the part of the trustor to create a trust.
Under Civil Code, Sec. 2103, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescinded, plaintiffs were not entitled to enforce the contract for the payment of the balance of the purchase price as a contract made for their benefit, since section 2103 does not apply to executory contracts without consideration.—*McDonald* v. *American Nat'l Bank*, 456.

BILL OF EXCEPTIONS.

Compelling Judge to Settle and Sign.

1. Under Code of Civil Procedure, Sec. 1158, which provides that a judge "may" settle and sign a bill of exceptions after he ceases to be a judge, he may be compelled to do so.—*Montana Ore Purchasing Co.* v. *Lindsay*, 24.

Mandamus to Compel Judge to Amend.

2. *Mandamus* will not lie upon application of the prevailing party to compel a judge to amend,—by incorporating therein particular matters, a bill of exceptions tendered by the defeated party, this being the exercise of a judicial, and not a ministerial duty.—*Montana Ore Purchasing Co.* v. *Lindsay*, 24.

Settled and Certified—Presumption.

3. A settled and certified bill of exceptions imports verity; presumptively, the judge included therein everything that it should contain.—*Montana Ore Purchasing Co.* v. *Lindsay*, 24.

Application to Compel Judge to Amend.

4. It is essential that the party, making application to compel a judge to amend a bill of exceptions, allege and show, not only that the matters set out in his proposed amendment are material, but also there was no evidence or proceeding, other than that contained in the settled bill and the proposed amendment, which is necessary to explain the exceptions.—*Montana Ore Purchasing Co.* v. *Lindsay*, 24.

Duty of Judge in Settling Bill.

5. It is the duty of a judge in settling a bill of exceptions to strike out of it all redundant and useless matter, and to make it truly represent the case, notwithstanding the assent of the parties to the incorporation of such redundant and useless matter or of any inaccurate statement.—*Montana Ore Purchasing Co.* v. *Lindsay*, 24.

Amendments—Transcript—Appeal.

6. Where proposed amendments of a bill of exceptions, which were allowed, were not incorporated in the bill, but only appeared in the transcript, they cannot be considered on appeal, since they are not part of the record.—*Yellowstone Nat'l Bank of Billings* v. *Gagnon*, 268.

Amendments—Appeal—Review.

7. Where proposed amendments to a bill of exceptions, which were allowed by the court, were not incorporated therein, such bill of exceptions will be disregarded on appeal, since the proposed bill and amendments were both necessary to constitute a bill of exceptions.—*Yellowstone Nat'l Bank of Billings* v. *Gagnon,* 268.

Certification by Judge.

8. The trial judge should not certify to the correctness of a proposed bill of exceptions and amendments thereof until after both have been engrossed. —*Yellowstone Nat'l Bank of Billings* v. *Gagnon,* 268.

Service—Presumption.

9. Where a statement on motion for a new trial has been allowed and settled by the trial court, the appellate court will presume, in the absence of evidence to the contrary, that it was duly served on the adverse party; but this presumption does not obtain where the statement or bill upon its face shows that the service was made too late, and that seasonable objection to it was interposed upon that ground.—*Beach v. Spokane R. & W. Co.,* 367.

Judgment Roll.

10. Where plaintiff's bill of exceptions was made up entirely of matters occurring after the entry of final judgment, it was no part of the judgment roll. and hence would not be considered on defendant's appeal from an order denying a new trial.—*Beach* v. *Spokane R. & W. Co.,* 367.

New Trial—Affidavits .

11. Where application for a new trial is made upon affidavits, the affidavits need not be presented by a bill of exceptions if the attorneys certify to the copies furnished on appeal to the supreme court.—*Beach* v. *Spokane R. & W. Co.,* 367.

Errors of Law.

12. A bill of exceptions can raise only errors of the court in its rulings upon points of law.—*Withers* v. *Kemper et al.,* 432.

BILL OF PARTICULARS.

Refusal to Order—Discretion.

Refusal to order a bill of particulars to be furnished is not error, unless abuse of discretion is shown.—*Beach* v. *Spokane R. & W. Co.,* 379.

BILLS AND NOTES.

Evidence—Contemporaneous Contracts.

1. A note sued on was given in consideration of the written contracts of the payee, made a few days before the date of the note, that he would, on or before a certain day, purchase or procure a purchaser for the maker's interests in certain mines at a stated price, and that, if he failed so to do, the maker would be absolved from all liability to convey such interests. *Held,* that these contracts were admissible, under Civil Code, Sec. 2207, as relating to the same matters as the note in suit between the same parties, and as part of substantially one transaction.—*Talbott* v. *Heinze,* 4.

Time as Essence—Failure of Proof.

2. Where a note was given in consideration of the payee's written promise to pay a stated amount in the maker's interests in certain mines before a

stated time, such time being expressly declared to be of the essence of the agreement, or that otherwise the maker would be released from all liability to convey such interests, failure to show that the interests were sold within the prescribed time and for the stated price, or a waiver of such conditions was fatal to a suit on the note.—*Talbott* v. *Heinze,* 4.

Evidence—Allegations and Proof Must Correspond.

3. Where a note sued on was payable only on the sale of the maker's interests in certain mines according to the terms of certain contracts made with the payee, an offer to prove that, after a sale of such interests, which did not occur until the time expressly limited by the contracts had expired, the maker had acknowledged the note, and promised to pay it, was an effort to prove a different contract, and inadmissible.—*Talbott* v. *Heinze,* 4.

Principal—Surety.

4. *Obiter.*—Where two persons execute a note, and each of them receives one-half of the consideration, they are, as between themselves, principals for half the debt and sureties for each other to the extent of the other half.—*Brownlee* v. *Young,* 38.

BONA FIDE PURCHASER.

See MINES AND MINING, 45, 46, 47.

BRIEFS.

See RULES OF SUPREME COURT.

Assignments of Error—Waiver.

1. Where assignments of error are not mentioned in the brief of appellant, they will be considered as waived.—*Anderson* v. *Cook,* 330. *Sweeney* v. *Montana Central Ry. Co.,* 543.

Disrespectful Brief.

2. A brief disrespectful in language and tone to the supreme court will not be considered, and will be ordered stricken from the files and returned to counsel who prepared it.—*Anderson* v. *Cook,* 330.

Failure to File Brief—Affirmance.

3. Where no brief is filed and submitted to the appellate court, nor any oral argument made pointing out any of the matters on which appellants rely for relief, the judgment will be affirmed.—*Mendenhall* v. *Lyon,* 343.

BUILDING AND LOAN ASSOCIATIONS.

Borrower—Credit for Interest and Dues Collected on Shares of Stock.

1. Where, the charter of a building and loan company having expired, the directors, as trustees in winding up its affairs, collected from a borrower interest and dues on shares of stock, on foreclosure of his mortgage the sums so collected should be credited on the mortgage debt.—*Farrell* v. *Evans et al.,* 444.

Borrower—Credit for Bonus.

2. Plaintiff, a stockholder in a building and loan association, borrowed therefrom, giving a bonus. Before the stock matured the charter expired. *Held,* that plaintiff should be credited with so much of the bonus as was unearned, computed by dividing the amount of bonus by the number of months which would be required to mature the stock, and multiplying the

quotient by the number of months still to elapse before such maturity.—*Farrell* v. *Evans et al.*, 444.

Borrower—Expiration of Charter—Credit.

3. When the charter of a building and loan association expired before its stock matured, a borrower should be credited with the accrued value of his shares of stock and the unearned portion of his bonus, computed to the time the charter expired, less his share of expenses of administering the affairs of the association.—*Farrell* v. *Evans et al.*, 444.

Receiver—Appointment.

4. Under Civil Code, Sec. 561, constituting the directors of a corporation dissolved for any reason trustees to wind up its affairs, when the directors of a building and loan association, whose charter has expired, are acting as such trustees, a receiver should not be appointed unless it appears that the party complaining has been, or is about to be, injured by unwarranted procedure on the part of such trustees.—*Farrell* v. *Evans et al.*, 444.

BURDEN OF PROOF.

See MINES AND MINING, 21, 45.
CONVERSION, 1, 2, 3.

CERTIORARI.

Supreme Court—Costs.

1. The fee bill of the clerk of the supreme court, as provided by Political Code, Sec. 872, making no provision for an appearance fee of the defendant in special proceedings, none can be charged by the clerk in a *certiorari* proceeding.—*State ex rel. King* v. *District Court*, 1.

Costs.

2. Since, under Code of Civil Procedure, Sec. 1943, the clerk of the court to which a writ of *certiorari* is directed must return the transcript required by the writ to the court out of which the writ issued, the outlay incident to the carriage of the return, maps, etc., should be ultimately borne by the party whose fault occasioned the expense.—*State ex rel. King* v. *District Court*, 1.

Record—Review.

3. Where a writ of review is taken to an order of the district court, which afterwards amends the order, and the original order and the amendment are both in the record before the supreme court without objection on the part of the respondent, the several orders may be considered together.—*State ex rel. Kelly* v. *District Court*, 33.

Supreme Court—Function of Writ.

4. By *certiorari* an order made without or in excess of jurisdiction may be annulled or modified when there is no appeal or other adequate remedy; but it cannot be used to correct errors of judgment in the exercise of jurisdiction.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court*, 504.

CONDEMNATION PROCEEDINGS.

Right of Way—Damages—Verdict.

1. Where, in a proceeding to condemn a right of way, plaintiff alleges title in defendant, a contention that the verdict for damages was not supported by the evidence, because there was no evidence that defendant's title was

valid, cannot be considered.—*Helena & Livingston S. & R. Co.* v. *Lynch,* 497.

Right of Way—Damages—Verdict—Review.

2. In a proceeding to condemn a right of way, the verdict assessing the damages will not be set aside, the evidence being conflicting, and there being sufficient to support the verdict.—*Helena & Livingston S. & R. Co.* v. *Lynch,* 497.

Right of Way—Damages—Verdict—Review.

3. The fact that the jury found the land taken in condemnation proceedings of greater value than that fixed by the commissioners, and the incidental damages to be $1,100, whereas the commissioners adjudged there were none, does not indicate that the jury were influenced by passion and prejudice justifying interference with the verdict.—*Helena & Livingston S. & R. Co.* v. *Lynch,* 497.

Right of Way—Trespass.

4. Where a railroad company commenced condemnation proceedings to acquire a right of way across plaintiff's land, and procured an *ex parte* order permitting it to take possession of the land without payment, and staying all actions and proceedings against it, such order was void, and any entry on plaintiff's land thereunder was a trespass.—*Sweeney* v. *Montana Central Ry. Co.,* 543.

CONSTITUTION.

List of Sections Cited or Commented Upon.

Article III, Section 3 68
Article III, Section 6 238
Article III, Section 11 119
Article III, Section 27 68
Article V, Section 26 235
Article VI, Section 4 240
Article VIII, Section 2 ..... 28, 32, 521
Article VIII, Section 3 521
Article XVI, Section 1 240
Article XVI, Section 3 240

Rights of Co-Tenants.

1. The provisos of "House Bill No. 1" of the Laws of 1899 (p. 134) apply to co-tenants whose estates were in existence when the law was passed, and, as to such estates, it is an attempt to disturb or destroy vested rights and, therefore, is inoperative and void as to them, being repugnant to Sections 3 and 27 of Article III of the Constitution of Montana, and also Amendment XIV of the Federal Constitution.—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.,* 41.

Legislature—Impairment of the Obligation of a State Contract.

2. Under Constitution, Art. III, Sec. 11, the legislature can no more impair the obligation of a contract entered into by the state than it can the obligation of a contract made between individuals.—*State ex rel. State Savings Bank* v. *Barret,* 112.

Statute Impairing the Obligation of a Contract.

3. A statute which changes the terms of an agreement by imposing new conditions, or dispensing with those expressed or implied, is repugnant to the Constitution as being a law impairing the obligation of a contract; and

the degree of impairment is immaterial.—*State ex rel. State Savings Bank* v. *Barret,* 112.

Statute Impairing the Obligation of a Contract.

4. Where a contract was made with reference to Political Code, Sec. 1601, which provided that, if certain state warrants to be issued in payment of work on the state school of mines building could not be paid on presentation for lack of money in the state school of mines building fund, out of which they were to be paid, they should bear interest at the rate of 7 per cent. per annum from the date of presentation, Laws of 1897, p. 124, repealing Political Code, Sec. 1601, was void as to such contract, being in conflict with Constitution of the United States, Art. I, Sec. 10, forbidding the impairment of the obligation of contracts by state legislation, and Constitution of Montana, Art. III, Sec. 2, to the same effect; hence the holder was entitled to interest on such warrants.—*State ex rel. State Savings Bank* v. *Barret,* 112.

Changing Name of County.

5. Constitution, Art. V, Sec. 26, prohibiting the legislature to pass local or special laws changing the name of persons or "places" applies to changing the names of counties, notwithstanding Article VI, Sec. 4, and Article XVI, Secs. 1, 3, recognize the power of the legislature to create new counties and to change those already established.—*State ex rel. Sackett* v. *Thomas,* 226.

"Persons."

6. The word "persons" used in the Constitution, Art. V, Sec. 26, embraces all persons, whether natural or artificial.—*State ex rel Sackett* v. *Thomas,* 226.

Supreme Court—Supervisory Control.

7. Constitution, Art. VIII, Secs. 2, 3, give the supreme court general supervisory control over other courts, under such regulations as may be prescribed by law, and confers power to issue and hear writs of *mandamus,* etc., and such other original and remedial writs as may be necessary to the exercise of its appellate jurisdiction. Code of Civil Procedure, Sec. 205, declares that, when jurisdiction is conferred on a court, and the course of proceeding is not specifically pointed out, any suitable process conformable to the spirit of the Code may be adopted. *Held,* that the power of supervisory control was a distinct power, and might be exercised to control the discretion of an inferior court in making an order from which no appeal would lie, and for which the writs appertaining to the appellate jurisdiction furnished no remedy.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court,* 504.

CONTRACTS.

See PLEADING, 6.
TELEPHONES.

State Contracts—Constitution.

1. Under Constitution, Art. III, Sec. 11, the legislature can no more impair the obligation of a contract entered into by the state than it can the obligation of a contract made between individuals.—*State ex rel State Savings Bank* v. *Barret,* 112.

Specific Performance—Dower Interest of Wife.

2. Where it is sought to compel specific performance of a contract to convey, and it appears that defendant's wife did not join in said contract, the

decree for specific performance will require a conveyance by said defendant reserving to his wife whatever right of dower she may have in the land.—*Jones* v. *Gieske,* 132.

Contract for Benefit of a Third Person—Enforcement.

3. Under Civil Code, Sec. 2103, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescinded, plaintiffs were not entitled to enforce the contract for the payment of the balance of the purchase price as a contract made for their benefit, since section 2103 does not apply to executory contracts without consideration.—*McDonald* v. *American Nat'l Bank,* 456.

CONVERSION.

See EVIDENCE, 4, 5.
PLEADING, 8.

Burden of Proof—Instruction.

1. An instruction, in an action for damages for conversion of a stock of merchandise, that "the burden is on the plaintiff to show that at the times alleged he was the owner of, and entitled to possession of, the goods, etc., and that at said time defendant sheriff wrongfully and unlawfully levied on and sold said goods, to plaintiff's damage; the burden is also on the plaintiff to show that the goods were of any greater value than $1,000, as admitted by the answer, and that he has expended any sum necessarily in endeavoring to recover said property or the value thereof,"—correctly stated the law on the issues of the ownership of the property and its value.—*Kipp* v. *Silverman,* 296.

Burden of Proof—Instruction.

2. Where plaintiff sought to recover damages for conversion of a stock of goods, apparently in the exclusive possession of his agent, and an instruction was given that the burden of proof was on the plaintiff to show his ownership, a further instruction that the burden was on the defendants to show that, at the time of the levy and sale constituting the alleged conversion, the property was owned by the agent, was erroneous, as conflicting with the previous instruction, and incorrectly stating the law.—*Kipp* v. *Silverman,* 296.

Burden of Proof.

3. In all cases where there is an issue as to title the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary, therefore, the obligation rests upon him throughout to sustain this burden by a preponderance of the evidence.—*Kipp* v. *Silverman,* 296.

COSTS.

Supreme Court—Special Proceedings.

1. The fee bill of the Clerk of the Supreme Court, as provided by Political Code, Sec. 872, making no provision for an appearance fee of the defendant in special proceedings, none can be charged by the clerk in a *certiorari* proceeding.—*State ex rel. King* v. *District Court,* 1.

Certiorari.

2. Since, under Code of Civil Procedure, Sec. 1943, the clerk of the court to which a writ of *certiorari* is directed must return the transcript required by the writ to the court out of which the writ issued, the outlay incident to the carriage of the return, maps, etc., should be ultimately borne by the

party whose fault occasioned the expense.—*State ex rel. King* v. *District Court,* 1 .

Supreme Court—Briefs.

3. The cost of expressing briefs to the supreme court is not properly taxable as part of the costs.—*State ex rel. King* v .*District Court,* 1.

Stenographer's Fees.

4. Under Code of Civil Procedure, Sec. 1866, awarding the legal fees paid stenographers for per diem or for copies as costs to the party entitled to costs, and Section 373, prescribing the legal fees of stenographers for copies of the testimony transcribed from their notes, since the clerk cannot transcribe the stenographic notes into longhand, the fee paid the stenographer for such transcription is chargeable as part of the costs.—*State ex rel. King* v. *District Court,* 1.

Supreme Court—Briefs.

5. The expense of printing briefs in the supreme court is chargeable as part of the costs.—*State ex rel. King* v. *District Court,* 1.

Supreme Court—Briefs.

6. Fees paid stenographers in taking dictation of briefs for the supreme court and typewriting them are not taxable to the defeated party.—*State ex rel. King* v. *District Court,* 1.

Payment of Sum Due After Suit Brought—Stipulation.

7. Where defendant paid $1,095 after suit brought, and in a stipulation admitted a balance due plaintiff of $6.64, but made no offer to allow judgment for that amount, it was error to refuse plaintiff a judgment for costs on his obtaining judgment for the $6.64, under Code of Civil Procedure, Sec. 1851, providing that costs are allowed of course to plaintiff on a judgment in his favor, in an action to recover money or damages, exclusive of interest, where he recovers over $50.—*Pape et al.* v. *Chauvin-Fant Furniture Co,.* 417.

Payment or Tender After Suit Brought.

8. Tender or payment after suit brought, to be effectual to prevent further costs, must be of the sum due, with costs accrued up to that time, and interest, if interest be due.—*Pape et al.* v. *Chauvin-Fant Furniture Co.,* 417.

COUNTIES.

Changing Name—Constitution.

1. Constitution, Art. V, Sec. 26, prohibiting the legislature to pass local or special laws changing the name of persons or "places" applies to changing the names of counties, notwithstanding Article VI,, Sec. 4, and Article XVI, Secs. 1, 3, recognize the power of the legislature to create new counties and to change those already established.—*State ex rel. Sackett* v. *Thomas,* 226.

Changing Name—Constitution.

2. Under the Constitution the legislature has the power to create counties and give them names, or destroy them, but after they are created they may not be disturbed by special or local legislation, except incidentally in the exercise of the creative power, or in cases where a general law cannot be made applicable.—*State ex rel. Sackett* v. *Thomas,* 226.

CRIMINAL LAW.

Grand Larceny—Evidence.

1. Evidence, in a prosecution for a grand larceny, reviewed, and *held*, insufficient to convict the defendant, since it raised no more than a suspicion of the alleged guilt of the defendant.—*State* v. *Whorton*, 11.

Grand Larceny—Instruction.

2. In a prosecution for grand larceny, an instruction that "in this case there is no allegation in the information that the property was in excess of fifty dollars; therefore it must have been taken from the person of the said G., or else defendant must be found not guilty,"—though not perspicuous, correctly stated the law, when considered with other instructions defining grand larceny.—*State* v. *Whorton*, 11.

DAMAGES.

As to power of court to remit excessive damages, see VERDICT, 3.
As to mitigation of damages, see TELEPHONES, 4.
As to verdict in a proceeding to condemn a right of way, see CONDEMNATION PROCEEDINGS.
As to measure of damages, see TRESPASS, 2.
As to duty of party to avoid or diminish damages, see TRESPASS, 3, 4.
As to evidence of damages, see TRESPASS, 6, 7, 8.

DEEDS.

Quitclaim Deed.

1. A quitclaim deed implies a doubtful title in the grantor, and it should not be held to pass anything more than a doubtful title.—*Butte Hardware Co.* v. *Frank*, 344.

Execution—Agent.

2. Deeds executed by an agent or attorney in fact should be executed in the name of the principal.—*Shackleton* v. *Allen Chapel A. M. E. Church*, 421.

Recording—Notice.

3. An instrument executed by a stranger to the title, whose authority does not appear of record, is not within the purview of the recording acts.—*Shackleton* v. *Allen Chapel A. M. E. Church*, 421.

DISCRETION.

Refusal of Leave to File an Amended Complaint.

1. It is not abuse of discretion to refuse leave to file an amended complaint which does not state a cause of action, or which would be open to a demurrer and to a motion to make more definite and certain.—*Haupt* v. *Independent Tel. & Messenger Co.*, 122.

Temporary Restraining Order—Mining Property.

2. Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company, and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause six weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period.—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.*, 135.

Preliminary Injunction

3. The granting of a preliminary injunction—being so largely a matter of discretion—will be sustained upon appeal where there has been a reasonable showing made in support of the application in the court below.—*Parrot Silver & Copper Co.* v. *Heinze,* 139.

Temporary Injunction—Mining Property.

4. Where, in an action by the owners of a mining claim to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by underground workings on plaintiffs' claim, there was much evidence that the apex of the vein was in defendants' claim, but there was some evidence to the contrary, and the development had not progressed far enough to identify the vein in defendants' claim with that in plaintiffs' claim, nor to show with certainty the location of the apex of the vein in controversy. *Held,* that though on paper the case made by the plaintiffs may not appear to be strong, yet the supreme court on appeal would not declare that the lower court had abused its discretion in granting a temporary injunction on such evidence.—*Maloney* v. *King,* 188.

Mandamus.

5. *Mandamus* cannot be used to control the discretion of an inferior court acting within the scope of its authority.—*State ex rel. King* v. *District Court,* 202.

Bill of Particulars.

6. If it be conceded that bills of particulars may be ordered to be furnished in actions where equitable relief only can be granted, it is nevertheless within the sound discretion of the court whether such a bill will be required, and unless an abuse of the discretion is shown it cannot be said that the court erred in refusing the application.—*Beach* v. *Spokane R. & W. Co.,* 379.

ELECTIONS.

School Elections—Bond Issue—Notice.

1. Under Political Code, Sec. 1940, declaring that notices of the holding of school elections, at which it is proposed to authorize bond issues, shall contain a statement of the time and place of holding the election, a notice not specifying the place is insufficient when attacked before the rights of third parties became vested, or the district is estopped, assuming that either condition might exist.—*Hauswirth* v. *Mueller,* 156.

School Elections—Bond Issue—Notice.

2. Where a notice of school election, at which it is proposed to authorize a bond issue, is insufficient for failure to designate the polling places, as required by Political Code, Sec. 1940, such insufficiency is not remedied by the fact that the notice of registration specifies the polling places, since Political Code, Sec. 1784, requiring notice of registration, does not require such notice to designate the polling places.—*Hauswirth* v. *Mueller,* 156.

ESCHEAT.

See PROBATE PROCEEDING.

EVIDENCE.

Contracts.

1. A note sued on was given in consideration of the written contracts of the payee, made a few days before the date of the note, that he would, on

or before a certain day, purchase or procure a purchaser for the maker's interests in certain mines at a stated price, and that, if he failed so to do, the maker would be absolved from all liability to convey such interests. *Held*, that these contracts were admissible, under Civil Code, Sec. 2207, as relating to the same matters as the note in suit between the same parties, and as parts of substantially one transaction.—*Talbott* v. *Heinze*, 4.

Allegations—Proof.

2. Allegations and proof must correspond.—*Talbott* v. *Heinze*, 4.

Motion to Strike Out—Refusal.

3. Where evidence offered by defendant is admissible against one plaintiff, but not against another, the latter cannot complain of the refusal of the court to strike out such evidence.—*Murray* v. *Montana L. & M. Co.*, 14.

Trover and Conversion—Pleadings—Evidence.

4. Where plaintiff alleged a wrongful seizure of his goods in the hands of his agent, and the answer, denying his ownership, showed the agent's exclusive possession, management and control thereof, a contract of agency between plaintiff and the agent was properly admitted to rebut the presumption of the agent's ownership.—*Kipp* v. *Silverman*, 296.

Trover and Conversion—Letters of Plaintiff.

5. Where plaintiff alleged a wrongful seizure of his goods in his agent's possession on an execution against his agent as owner thereof, letters of plaintiff, ordering goods to be shipped and billed to the agent, with duplicate bills to himself, were not admissible, since they showed no title in plaintiff, and were, at most, extrajudicial declarations, consistent with plaintiff's statement under oath.—*Kipp* v. *Silverman*, 296.

Memoranda.

6. Memoranda used by a witness to refresh his memory as to the cost of goods are no evidence of the value thereof.—*Kipp* v. *Silverman*, 296.

Trespass—Damages.

7. In an action for trespass and permanent injury to land, it was error to receive testimony of plaintiff and another as to what was offered for a strip across the land for a railroad, where there was no evidence that the one making the offer was agent of the railroad company, or had any authority to make the offer.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

Trespass—Damages—Market Value.

8. Where land has been permanently injured by a trespass, witnesses familiar with it, and with the uses to which it could be put, may give their opinion of its market value, in view of such uses, though it may not have been previously used for such purposes.—*Sweency* v. *Montana Central Ry. Co.*, 543.

EXECUTORS AND ADMINISTRATORS.

Attorney's Fee—Order of Court.

1. Where an administrator refuses to pay an attorney for the estate, and does not agree to abide by a finding of the court as to the amount due the attorney, the district court has no authority, on objections to the administrator's final account by the attorney, to in any wise order the administrator to include any sum of money in his accounts as due to such attorney, or to set apart any sum from the funds of the estate for the use of such attorney, and to amend his final account by including such allowance in it, since the employment and payment of counsel is a personal matter between

the administrator and the attorney.—*State ex rel. Kelly* v. *District Court,* 33.

Jurisdiction of District Court.

2. The district court's power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute.—*State ex rel. Kelly* v. *District Court,* 33.

FINDINGS.

Implied Findings.

1. In the absence of a compliance with the requirements of Secs. 1114, 1115, of the Code of Civil Procedure, a judgment will not be reversed on appeal though the express findings do not support it, since in such case the presumption obtains that the court impliedly found for the prevailing party upon the issues of fact not covered by the express findings.—*Yellowstone Nat'l Bank of Billings* v. *Gagnon,* 268.

Appeal—Conflict of Evidence.

2. Where the evidence is conflicting, the findings of the trial court will not be disturbed on appeal.—*Anderson* v. *Cook,* 330.

Appeal—Review.

3. Where allegations touching laches, the statute of limitations, and estoppel were denied by the replication, but the evidence was not preserved in the record, the trial court's finding on these questions will not be disturbed on appeal.—*Beach* v. *Spokane R. & W. Co.,* 379.

Appeal—Review—Presumption.

4. Where there is competent evidence in the record on appeal sufficient to justify the findings of the trial court, the fact that the trial court admitted irrelevant and immaterial evidence will not of itself necessitate a reversal of the judgment, since it will be presumed that the findings were based on such competent evidence.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consol. Mining Co.,* 427.

FRAUDULENT SALES.

Sale of Personal Property—Change of Possession—Instruction.

In an action, where the question of fact to which instructions complained of were applicable was whether or not a sale of personal property was accompanied by immediate delivery and followed by an actual and continued change of possession of the chattels, instructions reviewed, and *held,* that in view of the charge, taken as a whole, the instructions complained of were not erroneous.—*Morris* v. *McLaughlin,* 151.

HIGHWAYS.

Prescription—Statute of Limitations.

1. Plaintiff for several years had hauled the ore from its mine across defendant's land to a public highway. The public had traveled across the land where they chose since 1887, but the particular road since traveled by plaintiff was constructed by persons hauling its ores under contract in 1893. *Held,* that plaintiff had not acquired a prescriptive right to such road under Compiled Statutes of 1887, Div. I, Sec. 29, fixing a limitation of five years for actions to recover real property, when the Code of Civil Procedure took effect, July 1, 1895, which in Section 483, prescribes a limitation of ten years, since such right over uninclosed land cannot be acquired until

the travel has been confined to a particular way for the length of time prescribed by such statutes.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consolidated Mining Co.*, 427.

Public Highways—User—Statute of Limitations.

2. Under Political Code, Sec. 2600, providing that roads laid out or erected by others than the public, dedicated or abandoned to the public, are public highways, such dedication or abandonment is not shown by mere user until the period of limitations of actions to recover real property has elapsed.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consol. Mining Co.*, 427.

HUSBAND AND WIFE.

Contracts—Specific Performance—Dower Interest.

Where it is sought to compel specific performance of a contract to convey, and it appears that defendant's wife did not join in said contract, the decree for specific performance will require a conveyance by said defendant reserving to his wife whatever right of dower she may have in the land.—*Jones* v. *Gieske*, 132.

INJUNCTION.

See WATER RIGHTS, 3, 4, 5, 6.

Mines—Co-Tenants.

1. Any co-tenant whose estate was created after the Act of 1865 took effect, and before the amendment of 1890 became operative, is entitled to restrain by injunction such mining and removal of ore from the common property by his co-tenant, as is prohibited by the statute of 1865 and Section 592 of the Code of Civil Procedure, provided that the remedy at law is inadequate and the threatened injury irreparable.—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 41.

Appeal—Injunction *Pendente Lite*.

2. Before final decision on appeal from a decree finding plaintiff was not the owner of any interest in certain mining property, it was not an abuse of discretion for the trial court to refuse to grant said plaintiff an injunction *pendente lite* against the original defendant's successor in interest in a subsequent action, in the same court, wherein plaintiff's claim of title was identical with that of the original suit.—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.*, 85.

Complaint.

3. Where, on the trial of an action to restrain defendants from destroying plaintiff's telegraph wires and poles, there is no allegation in the complaint that defendants were threatening to do any injury to the plaintiff, or that he feared or believed there was an existing danger, or that defendants were insolvent, defendants' objection to any evidence, on the ground that the complaint fails to state any cause of action against them, should be sustained.—*Haupt* v. *Independent Tel. & Messenger Co.*, 122.

Amended Complaint—Discretion.

4. Where, in an action to restrain defendants from destroying plaintiff's telegraph wires and poles, the proposed amended complaint does not show that plaintiff has poles and wires of any material value, or sufficient for business, it is not an abuse of discretion for the court to refuse to permit such amended complaint to be filed, since such complaint does not show that plaintiff may be irreparably injured, and hence does not state a cause of action for injunction.—*Haupt* v. *Independent Tel. & Messenger Co.*, 122.

Temporary Restraining Order—Appeal.

5. Code of Civil Procedure, Sec. 1722, as amended February 28, 1899, provides that an appeal may be taken from an order granting or dissolving an injunction or refusing to grant or dissolve an injunction. *Held,* that the supreme court has no jurisdiction to grant an order of *supersedeas* to stay a temporary restraining order pending the hearing of an order to show cause why an injunction should not be issued, as there is no appeal from a temporary restraining order. (MR. JUSTICE PIGOTT dissenting.)—*Wetzstein v. Boston & Montana C. C. & S. Mining Co.,* 135.

Temporary Restraining Order—Abuse of Discretion.

6. Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company, and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause six weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period.—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.,* 135.

Temporary Restraining Order—Bond.

7. It is only in exceptional cases that a restraining order should issue without requiring a bond.—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.,* 135.

Mining Claims—Extralateral Rights—Discretion—Appeal.

8. Where the owner of a mining claim sought to restrain the owner of a neighboring claim from removing ore from beneath the surface of plaintiff's claim, and the issue was as to the course of defendant's vein across his claim, and the evidence was conflicting, *held,* that the granting by the lower court, after a hearing, of an injunction *pendente lite*—being so largely a matter of descretion, would be sustained upon appeal, there being substantial evidence tending directly to support plaintiff's contention as to the strike of the vein.—*Parrot Silver & Copper Co.* v. *Heinze,* 139.

Preliminary Injunction—Discretion—Appeal.

9. The granting of a preliminary injunction will be sustained upon appeal where there has been a reasonable showing made in support of the application in the court below.—*Parrot Silver & Copper Co.* v. *Heinze,* 139.

Practice— Appeal—Review.

10. Where, during the examination of a witness for defendants on an application for an injunction, the judge remarked that an injunction *pendente lite* would be granted on the evidence then before the court, such action does not constitute reversible error, he having heard the whole case before finally deciding that such injunction should issue.—*Maloney* v. *King,* 188.

Mining Claim—Extralateral Rights—Burden of Proof.

11. In action by the owners of a mining claim to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by underground workings on plaintiffs' claim, the burden was on defendants to show that the vein they were mining in plaintiffs' claim had its apex in their claim.—*Maloney* v. *King,* 188.

Temporary Injunction—Discretion—Appeal.

12. Evidence reviewed, and *held,* that the lower court had not abused its discretion in granting a temporary injunction.—*Maloney* v. *King,* 188.

Temporary Restraining Order—Appeal.

13. Code of Civil Procedure, Sec. 1722, as amended February 28, 1899, providing that an appeal may be taken from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, does not authorize an appeal from a temporary restraining order pending the hearing of an order to show cause why an injunction *pendente lite* should not be issued.—*Maloney* v. *King,* 256.

Injunction *Pendente Lite*—Appeal—Review.

14. Where, on an application for an injunction *pendente lite* to restrain defendants from obstructing a private road which plaintiff claims by prescription, the evidence is conflicting, the finding of the trial court that such right has not been acquired, and order denying an injunction, should be affirmed.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consol. Mining Co.,* 427.

Appeal—Evidence—Presumption.

15. Where, on an application for injunction to restrain the obstruction of a road, the trial court admitted irrelevant evidence, its order should not be reversed on that ground, if there was sufficient competent evidence to sustain its findings, since it will be presumed that its decision was based on such competent evidence.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consol. Mining Co.,* 427.

INSANE PERSONS.

See PLEADING (civil) 16.

INSURANCE.

Policy—Interpretation.

1. Since a policy insuring "articles usually kept for sale in retail drug stores" covers gasoline, benzine and ether, the keeping of such articles in reasonable quantities on the insured premises is permitted, and will not avoid the policy, though a printed condition therein declares in effect that, unless otherwise provided by agreement indorsed thereon or added thereto, the policy shall be void if there be kept benzine, ether or gasoline, notwithstanding any custom or usage of trade may permit them to be kept.—*Ackley* v. *Phenix Ins. Co.,* 272.

Policy—Recovery—Amount.

2. A decision by a referee allowing a recovery on a fire policy, without any deduction on account of a prior loss for which proof had been made, was not erroneous, where there was no evidence of the amount of the prior loss or that it had been adjusted and paid.—*Ackley* v. *Phenix Ins. Co.,* 272.

JUDGMENTS.

See LIENS.

Pleading—Judgment by Default.

1. Where a complaint alleged "that the said note is now long past due and unpaid, that payment of the same has been frequently demanded, and that plaintiff is now the owner and holder thereof," a judgment thereon by default is admissible in a collateral action, assuming that the complaint defectively alleged nonpayment of the note.—*Burke* v. *Inter-State S. & L. Association,* 315.

Collateral Attack.

2. A judgment which is merely voidable is not open to collateral attack.—*Burke* v. *Inter-State S. & L. Association,* 315.

Collateral Attack.

3. A judgment of the district court, having jurisdiction of the subject-matter of the action, unless void on its face or on inspection of the judgment roll, is not open to collateral attack.—*Burke* v. *Inter-State S. & L. Association,* 315.

Direct Attack by Appeal—Jurisdiction—Presumption.

4. Upon direct attack by appeal, the presumption that the court rendering a judgment by default had jurisdiction of the person of the defendant does not obtain; in such case the record must disclose the acquisition of jurisdiction over the defendant, otherwise the judgment will be reversed.—*Burke* v. *Inter-State S. & L. Association,* 315.

Direct Attack Other than by Appeal.

5. Where a direct attack, other than by appeal, is made upon the judgment of a domestic court of general jurisdiction, the presumption that jurisdiction was had of the defendant obtains, unless the record affirmatively shows the contrary, or that the defendant was at the time of service without the territorial limits of the court's jurisdiction—*Burke* v. *Inter-State S. & L. Association,* 315.

Summons—Service—Jurisdiction.

6. An affidavit of service of summons omitted the statement that the person serving the same was over 18 years of age, as required by Compiled Statutes 1887, Secs. 71, 78, 80, providing by whom and how the service shall be made, what proof thereof shall be sufficient, and that from the time of service of summons the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. *Held,* that a judgment rendered thereon was not void on its face, so as to be subject to collateral attack; the judgment roll showing no want of jurisdiction, but merely irregularity in obtaining it.—*Burke* v. *Inter-State S. & L. Association,* 315.

Summons—Irregular Service—Jurisdiction.

7. Service of summons by one who was not of the age required by statute, though defective, would not make void or subject to collateral attack a judgment rendered by a court having jurisdiction of the subject-matter and parties, and keeping within the limits of its power.—*Burke* v. *Inter-State S. & L. Association,* 315.

Summons—Irregular Service—Jurisdiction.

8. Service of summons on Sunday is not a nullity, but a mere irregularity, and a judgment based upon it is not void, but voidable (overruling *Hauswirth* v. *Sullivan,* 6 Mont. 203).—*Burke* v. *Inter-State S. & L. Association,* 315.

JURISDICTION.

As to jurisdiction of district courts in probate matters, see EXECUTORS AND ADMINISTRATORS.

As to question of jurisdiction when judgment is collaterally attacked, see JUDGMENTS.

District Courts.

The district court being a superior court of general jurisdiction, want of jurisdiction must affirmatively appear, to overthrow the presumption that the court had jurisdiction of the subject-matter of the action.—*Beach* v. *Spokane R. & W. Co.,* 379.

LARCENY.

See CRIMINAL LAW.

LIENS.

Judgment Liens—Unpatented Mining Claim.

1. An unpatented mining claim being real estate, a judgment lien attaches to it, under Code of Civil Procedure, Sec. 1197, declaring that from the time a judgment is docketed it becomes a lien on all real property of the judgment debtor.—*Butte Hardware Co.* v. *Frank,* 344.

Judgment Liens—Unpatented Mining Claims—Abandonment.

2. A judgment lien on an unpatented mining claim is not lost by the transfer in writing of the claim by the judgment debtor, on the ground that such transfer is an abandonment thereof, since the transfer in writing of an unpatented claim does not amount to an abandonment.—*Butte Hardware Co.* v. *Frank,* 344.

MANDAMUS.

Compel Performance of Ministerial Duty.

1. The duty which the writ of mandate may compel to be performed must be ministerial.—*Montana Ore Purchasing Co.* v. *Lindsay,* 24.

Amendment of Bill of Exceptions.

2. *Mandamus* will not lie upon application of the prevailing party to compel a judge to amend,—by incorporating therein particular r[illegible]rs, a bill of exceptions tendered by the defeated party, this being the exercise of a judicial, and not a ministerial duty.—*Montana Ore Purchasing Co.* v. *Lindsay,* 24.

Mandamus—Writ of Supervisory Control.

3. The writ of mandate will not be made to serve the office of a supervisory control writ.—*Montana Ore Purchasing Co.* v. *Lindsay,* 24.

Supreme Court—Original Jurisdiction.

4. Where the state treasurer refused to pay interest on certain warrants drawn on the school of mines building fund, directed by statute to be paid therefrom, the mere fact that it was a state officer refusing to perform a ministerial duty was not a sufficient reason for invoking the original jurisdiction of the supreme court by an application for *mandamus.*—*State ex rel. State Savings Bank* v. *Barret,* 112.

Supreme Court—Original Jurisdiction.

5. In the future, applications to the supreme court for writs of mandate must "set forth * * * the reasons which render it necessary that the writ should issue originally from this court" (Rule II, Subdivision 2).—*State ex rel. State Savings Bank* v. *Barret,* 112.

Judicial Errors.

6. *Mandamus* will not apply to a judicial act to correct an error.—*State ex rel. King* v. *District Court,* 202.

Judicial Discretion.

7. *Mandamus* will not lie to compel the court to hear a motion for dissolution of an injunction, where the court had dismissed the motion after having its attention called to the pleadings, orders and records in other cases between the same parties, and having determined that the same question had been decided, though the evidence on which its determination was based was unsatisfactory, since *mandamus* cannot be used to control the discretion of an inferior court acting within the scope of its authority.—*State ex rel. King* v. *District Court*, 202.

Clerk of District Court—Execution.

8. Under Code of Civil Procedure, Secs. 150, 152, requiring a district court to have a seal, and prescribing its form and the words to be inscribed on it; and Section 1210, permitting the party in whose favor a judgment is given to have a writ of execution for its enforcement, on demand, at any time within six years after entry, which writ is required, by Section 1211, to be issued in the name of the state, sealed with the seal of the court, and subscribed by the clerk, etc.,—a writ of mandate to compel the clerk to issue an execution with the seal, bearing the former name of a county, is the proper remedy, where the legislature, by a void act, has attempted to change the name of a county.—*State ex rel. Sackett* v. *Thomas*, 226.

Supreme Court—Function of Writ.

9. By *mandamus* the supreme court may coerce into activity, but it may not be used to control discretion or to correct errors.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court*, 504.

Costs.

10. Where it appears from the answer to an alternative writ of mandate that the defendant has performed what was sought by the writ to have performed, but no sufficient or any excuse is furnished why the matter commanded to be done—and which the uncontradicted averments of the application for the writ show ought to have been done—had not been done before the writ issued, the writ will be discharged at the cost of the defendant.—*State ex rel. Boston & Montana C. C. & S. Mining Co.* v. *District Court*, 566.

MASTER AND SERVANT.

See NEGLIGENCE.

MINES AND MINING.

Patent—Adverse Claimants.

1. The courts will exercise their equitable powers to control and limit the operation of a patent as between adverse claimants whenever it is made to appear that by a mistaken application of the law to the facts by the officers of the land department the patent has been issued to the wrong person, or when the holder of the legal title under it has obtained it by fraud upon the rights of one who is entitled to it.—*Murray* v. *Montana L. & M. Co.*, 14.

Certificate of Purchase.

2. A certificate of purchase issued by the government is evidence that the party receiving it had complied with all the conditions prescribed by law, and that he had acquired a vested interest in the land covered by the certificate.—*Murray* v. *Montana L. & M. Co.*, 14.

Certificate of Purchase.

3. The land covered by a certificate of purchase, immediately on the issuance thereof, becomes segregated from the mass of the public lands, and it is not subject to entry by any one else, and the officers of the land department have no right to convey said land to any one else, so long as the certificate is outstanding.—*Murray* v. *Montana L. & M. Co.*, 14.

Ejectment—Evidence—Directing Verdict.

4. Where plaintiff brings ejectment to recover a mining claim, and the defendant offers evidence of a superior claim, and that plaintiff wrongfully obtained the patent thereto, and holds the property in trust for defendant, it is not error to refuse to strike out such evidence for insufficiency, but the proper method is to move to direct a verdict.—*Murray* v. *Montana L. & M. Co.*, 14.

Ejectment—Defense.

5. Where ejectment is brought to recover a mining claim which has been patented to the plaintiff, the defendant may show as a defense thereto that he had purchased a prior claim thereto, and was entitled to a patent therefor, but that his vendor afterwards wrongfully conveyed the same property to a third person, who relinquished the claim to the government, which enabled plaintiff to obtain title to the property.—*Murray* v. *Montana L. & M. Co.*, 14.

Ejectment—Defense.

6. Where defendant in ejectment for a mining claim patented to plaintiff claims under a prior claim purchased from one who received a certificate of purchase therefor, he may show that plaintiff's patent was wrongfully procured, though his vendor did not adverse the ejector's application.—*Murray* v. *Montana L. & M. Co.*, 14.

Rights of Co-Tenants.

7. For one co-tenant, without the consent of the other, to mine and remove ore from the common property, is an unauthorized taking away and lessening in value of the property within the meaning of the Act of 1865 (Bannock Statutes, p. 454).—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 41.

Rights of Co-Tenants—Injunction.

8. Any co-tenant whose estate was created after the Act of 1865 took effect, and before the amendment of 1899 became operative, is entitled to restrain by injunction such mining and removal of ore from the common property by his co-tenant, as is prohibited by the statute of 1865 and Section 592 of the Code of Civil Procedure, provided that the remedy at law is inadequate and the threatened injury irreparable.—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 41.

Rights of Co-Tenants—Partition—Receiver.

9. Mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a co-tenant who has brought a suit for partition, and the mere fact that the care of the property involves considerable expense, will not authorize the appointment of a receiver pending the final hearing of the suit.—*Heinze* v. *Kleinschmidt*, 89.

Rights of Co-Tenants—Partition—Receiver.

10. Where a co-tenant has gone into possession of mining property by consent of his co-tenant, with the understanding that he was at liberty to engage in mining, nothing short of a clear ouster and refusal to account

coupled with insolvency, would justify a court in taking the property from him through the agency of a receiver.—*Heinze* v. *Kleinschmidt*, 89.

Rights of Co-Tenants—Partition—Receiver.

11. Under Section 592 of the Code of Civil Procedure, each tenant in common has the right to have mining property stand as it is until it is finally partitioned, and to justify a court in invading this right and mining the property through a receiver there must be a very clear showing.—*Heinze* v. *Kleinschmidt*, 89.

Temporary Restraining Order—Abuse of Discretion.

12. Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company, and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause six weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period.—*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.*, 135.

Extralateral Rights—Injunction *Pendente lite*—Discretion—Appeal.

13. Where the owner of a mining claim sought to restrain the owner of a neighboring claim from removing ore from beneath the surface of plaintiff's claim, and the issue was as to the course of defendant's vein across his claim, and the evidence was conflicting, *held*, that the granting by the lower court, after a hearing, of an injunction *pendente lite*—being so largely a matter of discretion, would be sustained upon appeal, there being substantial evidence tending directly to support plaintiff's contention as to the strike of the vein.—*Parrot Silver & Copper Co.* v. *Heinze*, 139.

Extralateral Rights—Side End Lines.

14. Where a vein on its course crosses two opposite side lines of the mining claim, such side lines thereby become in fact end lines, and the locator cannot follow the vein, either on its dip or strike, beyond vertical planes drawn through the side end lines.—*Parrot Silver & Copper Co.* v. *Heinze*, 139.

Extralateral Rights—Vein Crossing End and Side Line.

15. Where the apex of a vein passes through one of the parallel end lines and a side line, the extralateral rights of the locator are bounded by the vertical plane of such end line and a parallel plane extended downward through the point where the apex crosses the side line.—*Parrot Silver & Copper Co.* v. *Heinze*, 139 .

Grant from United States—Common Law Grant.

16. A grant from the United States under the laws regulating the disposition of mineral lands differs from a common law grant in two respects only, to-wit: (1) It is enlarged by the addition to it of certain conditional extralateral rights, and (2) it is subject to the conditional extralateral rights of neighboring locators or patentees or their successors.—*Parrot Silver & Copper Co.* v. *Heinze*, 139.

Common Law Rights.

17. Under Revised Statutes of the United States, Sec. 2322, where the apex of a vein is in defendant's location, but he has no right to follow it beyond the vertical plane of his south line owing to such line being an end line, plaintiff, whose location is situated south of that of defendant, is entitled, as against defendant, to the ores of said vein beneath plaintiff's surface.—*Parrot Silver & Copper Co.* v. *Heinze*, 139.

Injunction—Receiver.

18. Certain parties claiming title to a mine sued for an injunction restraining certain others and their lessee from working the mine. The lessee's estate would terminate before a final adjudication of the matter could be had, and the restraining order sought would do him great damage. *Held,* that a receiver could not be appointed on the ground that the bond which would be required on granting the restraining order, suit on which would be the lessee's only remedy, would not afford such lessee adequate protection, since it would be presumed that the bond required would be sufficient to protect the lessee from any loss occasioned by such order.—*Hickey* v. *Parrot Silver & Copper Co.,* 164.

Injunction—Receiver.

19. Under Code of Civil Procedure, Sec. 950, Subd. 6, authorizing courts to appoint receivers in all cases "where receivers have heretofore been appointed by the usages of courts of equity," the lessee in possession of a certain mine, the operation of which was enjoined pending the settlement of a dispute as to title between the lessor and others, was not entitled to the appointment of a receiver, with power to remove ore, on the ground that his lease would expire before final adjudication, and hence be rendered valueless by the injunction, since the receivership was not necessary to the preservation of the rights of the parties.—*Hickey* v. *Parrot Silver & Copper Co.,* 164.

Injunction—Receiver.

20. Under Code of Civil Procedure, Sec. 950, Subd. 6, a receiver will not be appointed in an action for an injunction against trespasses with power to take away the substance of the estate, on the ground that the defendant will enjoin or has enjoined the plaintiff in possession from extracting ore from the property.—*Hickey* v. *Parrot Silver & Copper Co.,* 164.

Extralateral Rights—Burden of Proof—Injunction.

21. In action by the owners of a mining claim to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by underground workings on plaintiffs' claim, the burden was on defendants to show that the vein they were mining in plaintiffs' claim had its apex in their claim.—*Maloney* v. *King,* 188.

Extralateral Rights—Injunction—Discretion.

22. Where, in an action by the owners of a mining claim to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by underground workings on plaintiffs' claim, there was much evidence that the apex of the vein was in defendants' claim, but there was some evidence to the contrary, and the development had not progressed far enough to identify the vein in defendants' claim with that in plaintiffs' claim, nor to show with certainty the location of the apex of the vein in controversy. *Held,* that though on paper the case made by the plaintiffs may not appear to be strong, yet the supreme court on appeal would not declare that the lower court had abused its discretion in granting a temporary injunction on such evidence.—*Maloney* v. *King,* 188.

Prima Facie Trespassers.

23. The owners of a mining claim, who, by underground workings, enter within the vertical planes of the surface boundaries of an adjoining claim owned by others, are *prima facie* trespassers.—*Maloney* v. *King,* 188.

Forfeiture—Relocation—Instruction.

24. Plaintiff based his title to a mining claim on a location made in 1877, and there was evidence that a third person had located the ground in 1876;

but he testified that he never did any work thereon except "to represent the gulch," and there was no other evidence that he ever did any work after his location, while there was some evidence that work had been done on the ground in 1869, but that none was done thereafter until plaintiff located the claim. The court instructed that, if such person located the claim at the time stated, plaintiff could acquire no title by his location, unless such person had abandoned the claim. *Held* that this was misleading, since there might have been a forfeiture found by reason of such person's failure to represent the claim.—*McKay* v. *McDougall,* 258.

Abandonment.

25. Abandonment, as applied to mining claims held by location merely, takes place only when the locator voluntarily leaves his claim to be appropriated by the next comer, and regardless of what may become of it in the future.—*McKay* v. *McDougall,* 258.

Forfeiture.

26. A forfeiture takes place by operation of law, without regard to the intention of the appropriator, whenever he,—having neglected to make the required annual expenditure upon the claim within the time allowed,—fails to preserve his right by resuming work thereon before a complete relocation by another.—*McKay* v. *McDougall,* 258.

Discovery—Marking Boundaries.

27. In the absence of a statute making additional requirements, or a local rule or custom, a compliance with the statutes of the United States (as to discovery and marking of the boundaries of mining claims) is sufficient.—*McKay* v. *McDougall,* 258.

Valid Location—Question of Fact.

28. Whether the evidence shows a valid location is a question of fact for the jury,—and not a matter of law for the court to decide.—*McKay* v. *McDougall,* 258.

Forfeiture—Question of Fact.

29. Forfeiture is a question of fact for the jury upon the evidence to decide.—*McKay* v. *McDougall,* 258.

Relocation—Resumption of Work.

30. Where a mining claim on which plaintiff had located was relocated by defendant, but the notice filed by him was defective, and it was shown that, before it was properly remedied by an amended notice, plaintiff had performed work on the mine, it was error to instruct that on a suspension of work the right to resume was lost, where a qualified relocator enters and initiates a location, and a resumption of work between the initiatory and final acts of location is of no avail, since the acts required in the location of a claim are distinct, and all must be performed before a legal location exists.—*McKay* v. *McDougall,* 258.

Relocation—Notice of Location—Amendment.

31. Plaintiff located a mining claim on ground which a third person had located the year before. Subsequently defendant entered and filed a notice of location on the same claim, but owing to defects therein he afterwards filed an amended notice. and meanwhile plaintiff had resumed work. *Held,* that as there was a question as to whether the claim by the third person was a valid and subsisting one when plaintiff entered, in which case plaintiff's location was void and defendant's title was good, the amended notice filed by defendant was admissible in evidence.—*McKay* v. *McDougall,* 258.

Unpatented Claims—Judgment Lien.

32. An unpatented mining claim being real estate, a judgment lien attaches to it, under Code of Civil Procedure, Sec. 1197, declaring that from the time a judgment is docketed it becomes a lien on all real property of the judgment debtor.—*Butte Hardware Co.* v. *Frank,* 344.

Unpatented Claims—Abandonment—Judgment Lien.

33. A judgment lien on an unpatented mining claim is not lost by the transfer in writing of the claim by the judgment debtor, on the ground that such transfer is an abandonment thereof, since the transfer in writing of an unpatented claim does not amount to an abandonment.—*Butte Hardware Co.* v. *Frank,* 344.

Unpatented Claims—Judgment Lienor—Adversing.

34. Rev. St. U. S. Sec. 2332, declares that nothing in the chapter of the Revised Statutes relative to the locating, holding or procuring of titles to mining claims and to adverse claims, etc., shall be deemed to impair any lien which may have attached in any way to any mining claim prior to the issuance of the patent. *Held,* that a judgment creditor having a lien on an unpatented mining claim was not obliged to adverse the claim of the locator under the United States statutes providing for the filing of adverse claims against one seeking a patent for a mining claim on the public domain. But after execution levied and officer's deed made and delivered, the purchaser should adverse, because the lien is gone as a lien.—*Butte Hardware Co.* v. *Frank,* 344.

Right of Way—Condemnation Proceedings—"Prospect."

35. In condemnation proceedings for a right of way over mining claims, it was not necessary for the court—at least in the absence of a specific request therefor—to define the word "prospect," as used in an instruction, since the term is well understood in all mining districts in the West.—*Helena & Livingston S. & R. Co.* v. *Lynch,* 497.

Ditches and Flumes—Condemnation Proceedings.

36. In condemnation proceedings for a right of way for a ditch and flume over mining claims, an instruction, contrary to Civil Code, Secs. 1897-1899, that the right of defendant to the use of any water in the ditch was dependent on an agreement between the parties, was harmless error where there was no evidence to which the instruction could apply.—*Helena & Livinston S. & R. Co.* v. *Lynch,* 497.

Mining Claims—Common Law Rights—Order for Inspection and Survey.

37. Relators were the owners of patented claims Anaconda, St. Lawrence, Smoke Stack and Rob Roy, and subsequently defendant located the Copper Trust mine on a discovery near the eastern corners of the Smoke Stack and St. Lawrence, alleging that the vein there discovered passed on its strike through the Smoke Stack, the St. Lawrence and into the Anaconda. Defendant's claim was so located as to include within its lines most of the space included within the Smoke Stack and St. Lawrence, and also a space to the southwest of these claims and to the east of the Anaconda not included in the surface rights of the three claims through which the vein passed, nor subject to their extralateral rights, but which was within the surface of the Rob Roy. Defendant did not claim any right to follow the vein to such space, but that it belonged to him by appropriation. *Held,* that the ores in such space belonged *prima facie* to the relators, as owners of the Rob Roy, by virtue of common-law rights, though no part of the apex was within its bounds, and therefore it was error, in an action by the defendant against the relators for removing ores from such space, to grant

him an order for the inspection of relators' mines, under Code of Civil Procedure, Secs. 1314, 1315, providing that such order may be made "for good cause shown" pending an action for the recovery of a mine.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court,* 504.

Location.

38. *Quaere*: Whether a valid location can be made by a trespass upon the surface of lands to which patent has already been issued.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court,* 504.

Mining Claim—Common Law Rights—Extralateral Rights.

39. The owner of a mining claim holds everything beneath the surface, subject only to the rights of an adjoining locator or patentee, who has the apex of a vein and who has complied with the statute, to pursue it on its dip beneath the surface.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court,* 504.

Order for Inspection and Survey—Supreme Court—Supervisory Control.

40. Where defendant sued relators, alleging that they were removing ore from certain premises the right to which was in defendant, but the evidence showed that the *prima facie* right was in relators, an order granting defendant and his employees right to enter and inspect all of relators' surrounding mines for the period of 40 days for the purpose of obtaining evidence, being an order not appealable nor subject to control by any of the specified writs within the jurisdiction of the court, it was a proper case for the court to exercise the power of "supervisory control" over the inferior court, conferred by Constitution, Art. VIII Sec. 2.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court,* 504.

Order for Inspection and Survey.

41. Under Section 1314 of the Code of Civil Procedure, the court may not, without reasonable showing, and in disregard of the rights of the party in possession of mining property, or in control of the means of access to it, permit his adversary to enter upon it, merely because he desires and asks for an order permitting him to do so; whenever the order is made without "good cause shown," it is an infringement on the rights of the party in possession, and may be set aside as unauthorized.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court,* 504.

Location—Occupancy—Tenants in Common—Oral Partition.

42. Where, prior to the location of a quartz mining claim, the surface was occupied by different persons, who agreed that one should locate for all, and that, after patent issued, conveyances should be made, vesting in each full title to the surface occupied by him, but the conveyances were in fact never made, the agreement and continued occupation after the patent issued did not constitute an oral partition, as the location of such claim confers on the locator the right to the exclusive enjoyment of all the surface ground.—*Mullins* v. *Butte Hardware Co.,* 525.

Location—Occupancy—Tenants in Common—Oral Partition.

43. Prior to the location of a quartz mining claim the occupants of the surface had but a naked possessory right, and after the location by one of them for all, under an agreement to convey to each the surface occupied, the right was but an equity to hold such person as trustee, and the agreement and continued occupation could not amount to an oral partition.—*Mullins* v. *Butte Hardware Co.,* 525.

Oral Partition—Notice.

44. The person securing the patent having executed deeds to each of the occupants for an undivided interest in the mine, but not referring to any

surface interest as distinguished from the interest in the whole claim, the continued occupation of the separate portions of the surface, with payment of taxes, and the making of improvements thereon, was not inconsistent with the record title, and gave no notice to subsequent purchasers or incumbrancers that the occupant claimed any certain divided interest; and Civil Code, Sec. 502, relating to notice, had no application.—*Mullins* v. *Butte Hardware Co.*, 525.

Oral Partition—Notice—Burden of Proof.

45. If the burden was on subsequent purchasers to show that they purchased interests in a mining claim for a valuable consideration, and without notice of the occupant's equitable unrecorded title to certain surface rights, such burden was discharged by the introduction of the deeds under which the purchasers held, setting forth a valuable consideration.—*Mullins* v. *Butte Hardware Co.*, 525.

Oral Partition—Notice— *Bona Fide* Purchaser.

46. Where a grantee of a mine, with notice of an outstanding equity, conveys to one without notice, and for a valuable consideration, such purchaser is protected.—*Mullins* v. *Butte Hardware Co.*, 525.

Oral Partition—Notice— *Bona Fide* Purchaser.

47. The record title to a mine held by the occupants of the surface was of undivided interests, without reference to any claim for separate and distinct surface right, and C. one of such owners conveyed an undivided interest to M. by deed recorded in 1880. M. conveyed to H. by deed recorded in 1882. H. Conveyed to D. by deed recorded in 1889. In 1885 the same owner (C.) conveyed another undivided interest to N. by a deed purporting also to convey a distinct surface right thereon. *Held*, that the recorded deeds to M. and H. were sufficient to protect D. and his grantees from a claim that they had notice of the claim to a distinct portion of the surface. The occupancy of the lot by N., as his grantor's lessee, for a year and a half before his purchase, and his continued occupancy, was not notice of the separate claim to surface rights. Even if M. and H. were chargeable with notice of N.'s claim, the title of D. and his grantees was superior.—*Mullins* v. *Butte Hardware Co.*, 525.

MORTGAGES.

Foreclosure—Pleading.

1. Where a mortgage—given to secure two notes—provided that in case of default in the payment of the principal as provided in the notes, or any part thereof, or if the interest thereon be due and unpaid for 30 days, the mortgagee could consider the whole principal expressed in the notes as immediately due and payable, a complaint which alleged one of the notes to be due and unpaid would support a judgment for the full amount secured, though, at the time the complaint was filed, 30 days had not elapsed after default in payment of interest.—*Caplice Commercial Co.* v. *Cassidy*, 81.

Foreclosure—Parties.

2. Where a second mortgage of church property did not purport to be the deed of the corporation, but was executed by the president and secretary of the trustees individually, and duly recorded, it was not necessary, in order to foreclose their equitable right to redeem, to make the second mortgagees parties to an action to foreclose a prior mortgage on the church property, since the second mortgage was not constructive notice that it was on such property.—*Shackleton* v. *Allen Chapel A. M. E. Church*, 121.

Foreclosure—Evidence—Trial Practice.

3. In a suit to foreclose a mortgage, it was proper to refuse to strike out the testimony of the plaintiff at the close thereof on the ground that her testimony was incompetent, immaterial and irrelevant, in that she had failed to produce, or account for the nonproduction of, the note on which the action was based; plaintiff's testimony being not only as to a search for the note, but as to circumstances tending to suppor her allegation that the note had not been paid; and, as the testimony for plaintiff was not all in, the court had no knowledge but that further evidence might be introduced, showing a search.—*Withers* v. *Kemper et al.*, 432.

MUNICIPAL CORPORATIONS.

Streets—Nuisance.

1. One who creates or maintains a nuisance in a street is liable to a passenger who, being himself without negligence, is injured thereby.—*Robinson* v. *Mills*, 391.

Streets—Nuisance—Excavation.

2. An unauthorized excavation of a city street is a nuisance *per se*.—*Robinson* v. *Mills*, 391.

Streets—Nuisance—Excavation.

3. The failure to replace a city street in its former safe condition after the purpose of an authorized excavation has been accomplished constitutes a nuisance.—*Robinson* v. *Mills*, 391.

Streets—Excavation—Negligence.

4. Under Political Code, Sec. 4800, Subd. 73, requiring a city street excavated by the permission of the city authorities to be placed in as good condition as formerly existed by the person making the excavation, a water company authorized to make an excavation is negligent in failing to use the highest degree of care to fill the excavation in such a manner that it will not be rendered dangerous by the action of rain, frost, etc.—*Robinson* v. *Mills*, 391.

Streets—Excavation—Negligence.

5. Under Political Code, Sec. 4800, Subd. 73, a water company authorized to make an excavation is liable to an individual for injuries received through its negligence in failing in its duty to restore the street to its former safe condition.—*Robinson* v. *Mills*, 391.

Streets—Excavation—Liability—Instruction.

6. An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, and required by Political Code, Sec. 4800, Subd. 73, to place the street in as good condition as before the excavation, that it is incumbent on the company to restore the street to as good condition as before the excavation, is not erroneous on the ground that the exact restoration of the street is impossible, but is to be construed as only requiring its restoration to its former safe condition.—*Robinson* v. *Mills*, 391.

Streets—Excavation- Liability—Instruction.

7. An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, that it is liable for injuries resulting from its failure to put the street in its former condition, as required by

Political Code, Sec. 4800, Subd. 73, is not erroneous in imposing the liability of an insurer, when considered in connection with other instructions only requiring the exercise of the highest degree of care.—*Robinson* v. *Mills,* 391.

Sidewalks—Defects—Question for Jury.

8. In a sidewalk composed of cement blocks, four were broken and replaced. The new blocks were so hard and smooth that 100 persons slipped and fell thereon in about a year, and 25 fell within two months of plaintiff's accident. *Held,* that the question whether the walk was defective and in a dangerous condition was for the jury.—*Leonard* v. *City of Butte,* 410.

Sidewalks—Defects—Notice—Question for Jury.

9. Where four blocks in a cement sidewalk differed from the others, and were so slippery that 100 people had fallen thereon within a year, and 25 within two months,—one of them being seriously hurt, and another being helped up by a policeman,—and the place had grown so notorious that it caused amusement among the passers when persons fell there, the question whether the city authorities had notice, actual or constructive, of the defect, was for the jury.—*Leonard* v. *City of Butte,* 410.

Sidewalks—Defects—Liability—Instructions.

10. Where, in an action against a city for injury caused by a defective sidewalk, the jury are correctly instructed as to the duty of the city relating to walks, but the court, in a paragraph relating to the notice to the city of a defect, declared its duty to be to keep sidewalks "in good condition and safe," instead of in a reasonably safe and good condition, the verdict should not be set aside on that ground, since it was manifest the jury could not have been misled by the charge as a whole.—*Leonard* v. *City of Butte,* 410.

NEGLIGENCE.

Master and Servant.

1. An employee was struck and injured by a cable attached at one end to a locomotive, and at the other to a plow then being used to unload cars of dirt at a curve. The cable slipped over a wooden stake in a socket on the edge of a car on the outside of the curve, behind which it was placed by plaintiff's fellow servants to prevent the plow being pulled off the car on the inside of the curve. There was a groove in the socket holding the stake, in which the cable was usually placed when unloading dirt at a curve. There was no evidnce that a block and tackle would have been safer than the groove, which means was reasonably safe. *Held,* that the evidence did not support a verdict that the employee was injured by the employer's neglect to provide and use a block and tackle to guide such cable.—*Nolan* v. *Montana Central Ry. Co.,* 107.

Master and Servant.

2. A complaint alleged that plaintiff was injured by the fall of rock from the roof of a mine, and that defendant failed to furnish a reasonably safe place for plaintiff to work, and negligently allowed the roof of the mine to remain in an unsafe condition, and failed to properly brace it, and that it was liable to cave in unless properly supported. There was evidence that the roof of the mine was in a lose and dangerous condition, but the fall of slate was immediately caused by the attempt of a mining engineer to remove a small portion of the slate in fixing a plug for a sight. *Held,* that it was error to limit plaintiff's right of recovery to a showing that the roof

fell from its own weight, and not in connection with any other cause.—*Freeman* v. *Sand Coulee Coal Co.*, 194.

Concurring Causes.

3. Where an injury is the result of two concurring causes, the party responsible for one of them is not exempt because the person who is responsible for the other may be equally culpable.—*Freeman* v. *Sand Coulee Coal Co.*, 194.

City Streets—Excavation.

4. Under Political Code, Sec. 4800, Subd. 73, requiring a city street excavated by the permission of the city authorities to be placed in as good condition as formerly existed by the person making the excavation, a water company authorized to make an excavation is negligent in failing to use the highest degree of care to fill the excavation in such a manner that it will not be rendered dangerous by the action of rain, frost, etc.—*Robinson* v. *Mills*, 391.

City Streets—Excavation.

5. Under Political Code, Sec. 4800, Subd. 73, a water company authorized to make an excavation is liable to an individual for injuries received through its negligence in failing in its duty to restore the street to its former safe condition.—*Robinson* v. *Mills*, 391.

City Streets—Excavation—Liability of Receiver.

6. A receiver of a water company, appointed after the excavation has been filled, but before the occurrence of an accident resulting from its negligence in making the fill, is liable for such injuries, though he has no notice of the defect, since the appointment cast on him the duty of repairing the street, and he is presumed to have knowledge of the defect.—*Robinson* v. *Mills*, 391.

NEW TRIAL.

Excessive Verdict.

1. Where, in an action for conversion, the trial court regards the verdict as in excess of the value of the property, it is not error to give the plaintiff the option of remitting the excess, and, if he does so, to order the verdict to stand for the residue, instead of granting a new trial absolutely, under Code of Civil Procedure, Sec. 1771, Subd. 6, authorizing the granting of a new trial for insufficiency of the evidence to justify the verdict.—*Chicago Title & Trust Co.* v. *O'Marr*, 242.

Statement—Striking Out.

2. Where a statement on motion for a new trial was erroneously stricken from the record by the trial court, such proceeding would vitiate the order denying a new trial, since the motion therefor rested on the statement.—*Beach* v. *Spokane R. & W. Co.*, 367.

Contradictory Instructions.

3. Where instructions are upon a material point, and are in conflict, a new trial will be granted, unless it appears that the appellant has suffered no prejudice.—*Robinson* v. *Mills*, 391.

Contradictory Instructions.

4. Where conflicting instructions are upon an immaterial point, and it is not reasonably apparent that the jury have been misled, a new trial will not be granted.—*Robinson* v. *Mills*, 391.

NONSUIT.

Failure of Proof—Negligence.

Evidence reviewed and *held*, that the trial court erred in denying a motion for nonsuit.—*Nolan* v. *Montana Central Ry. Co.*, 107.

NUISANCE.

Streets.

1. One who creates or maintains a nuisance in a street is liable to a passenger who, being himself without negligence, is injured thereby.—*Robinson* v. *Mills*, 391.

Streets—Excavation.

2. An unauthorized excavation of a city street is a nuisance *per se*.—*Robinson* v. *Mills*, 391.

Streets—Excavation.

3. The failure to replace a city street in its former safe condition after the purpose of an authorized excavation has been accomplished constitutes a nuisance.—*Robinson* v. *Mills*, 391.

PARTITION.

See TENANCY IN COMMON.

PLEADING (Civil).

Mortgage—Foreclosure.

1. Where a mortgage—given to secure two notes—provided that in case of default in the payment of the principal as provided in the notes or if the interest thereon be due and unpaid for 30 days, the mortgagee could consider the whole principal expressed in the notes as immediately due and payable, a complaint which alleged one of the notes to be due and unpaid would support a judgment for the full amount secured, though, at the time the complaint was filed, 30 days had not elapsed after default in payment of interest.—*Caplice Commercial Co.* v. *Cassidy*, 81.

Injunction—Complaint.

2. Where, on the trial of an action to restrain defendants from destroying plaintiff's telegraph wires and poles, there is no allegation in the complaint that defendants were threatening to do any injury to the plaintiff, or that he feared or believed there was an existing danger, or that defendants were insolvent, defendants' objection to any evidence, on the ground that the complaint fails to state any cause of action against them, should be sustained.—*Haupt* v. *Independent Tel. & Messenger Co.*, 122.

Bill in Equity.

3. There are, at least, three rules to be observed in framing a bill in equity: (1) To state the plaintiff's rights in the subject matter; (2) to set up the acts which the defendant is doing or treatening to do against such rights; and (3) to give a distinct statement in ordinary and concise language of such facts as show to the court that the injury will be irreparable.—*Haupt* v. *Independent Tel. & Messenger Co.*, 122.

Injunction—Amended Complaint—Discretion.

4. Where, in an action to restrain defendants from destroying plaintiff's telegraph wires and poles, the proposed amended complaint does not show that plaintiff has poles and wires of any material value, or sufficient for business, it is not an abuse of discretion for the court to refuse to permit

such amended complaint to be filed, since such complaint does not show that plaintiff may be irreparably injured, and hence does not state a cause of action for injunction.—*Haupt* v. *Independent Tel. & Messenger Co.*, 122.

Counterclaim—Replication.

5. In a suit on a note, defendant set up as a counterclaim the amount taxed by the court for his legal services on a mortgage foreclosure. Plaintiff's replication alleged that it had been agreed between them that whenever, on a foreclosure sale, plaintiff purchased the property, defendant should receive one-half of the attorney's fee as taxed by the court, and that the other half should go to the plaintiff; that plaintiff had purchased under the foreclosure in question; and that one-half of the fee allowed had been credited on the note. *Held,* that it was error to strike that part of plaintiff's replication relative to the agreement, on the ground that it was against public policy, since if the contract was immoral, and had been executed, the plaintiff had a right to show the facts in defense of the counterclaim.—*Murray* v. *Haldorn,* 218 .

Contracts—Performance of Conditions Precedent .

6. Under Code of Civil Procedure, Sec. 746, declaring that in pleading performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, a complaint in an action on a fire policy sufficiently alleges performance of a condition precedent in the policy, requiring loss to be ascertained by arbitrators in case of disagreement, when it alleges generally that plaintiff has duly performed all the conditions of the policy on his part.—*Ackley* v. *Phenix Ins. Co.*, 272.

Motion to Strike Out Part of an Answer—Notice.

7. Notice of a motion to strike out part of an answer, set for hearing August 2, but not called till the day of trial, in October of the same year, when both parties were present, was sufficient.—*Kipp* v. *Silverman,* 296.

Trover and Conversion—Redundancy.

8. Where plaintiff alleged a wrongful levy on goods in possession of his agent, and the answer denied plaintiff's ownership, justifying the seizure thereof on a judgment execution against the agent as the owner of the goods, a further paragraph of the answer, alleging the agent's exclusive ownership, and that plaintiff was estopped from claiming any interest therein, because the goods were on an Indian reservation, the rules of which forbade plaintiff from selling at said place, was redundant, and hence properly stricken out.—*Kipp* v. *Silverman,* 296.

Trover and Conversion—Pleading Evidence.

9. Where plaintiff alleged a wrongful seizure of his goods in the hands of his agent, and the answer, denying his ownership, showed the agent's exclusive possession, management and control thereof, a contract of agency between plaintiff and the agent was properly admitted to rebut the presumption of the agent's ownership.—*Kipp* v. *Silverman,* 296.

Defective Denial.

10. A reply denying "each and every material allegation" of the answer, is bad for uncertainty.—*Burke* v. *Inter-State Savings & Loan Association,* 315.

Allegation of Nonpayment of a Note—Judgment by Default.

11. Where a complaint alleged "that the said note is now long past due and unpaid, that payment of the same has been frequently demanded, and that plaintiff is now the owner and holder thereof," a judgment thereon

by default is admissible in a collateral action, assuming that the complaint defectively alleged nonpayment of the note.—*Burke* v. *Inter-State S. & L. Association*, 315.

Bill in Equity—Substantive Allegations.

12. A complaint alleged that plaintiff had a docketed judgment against R. and that certain unpatented mining claims were conveyed by deed absolute from D. to R., who on the same day gave a quitclaim deed to F., and that the property was sold to plaintiff at judgment sale. F. was in the possession of the property at the time the quitclaim deed was made. *Held*, that there being neither an allegation that R. ever owned any of the property, nor that F. ever got any property or title from him, and there being an implication of doubt as to the title from R., owing to his having given a quitclaim deed to one in possession, the complaint was insufficient to sustain a suit on the theory that the judgment sale of the land to plaintiff transferred to him title to the claims.—*Butte Hardware Co.* v. *Frank*, 344.

Water Rights— Complaint—Parties—Demurrer.

13. Where the complaint in a suit to restrain defendant from diverting the waters of a creek does not show that plaintiffs had not brought in all the claimants of such waters, the objection that there was a defect of parties cannot be taken by demurrer.—*Beach* v. *Spokane R. & W. Co.*, 379.

Water Rights—Answer—Parties.

14. Where property owners having the right to divert waters from a creek seek to restrain a diversion therefrom by a third person, all the property owners using such waters are not necessary parties, and hence allegations to that effect in defendant's answer were properly stricken out.—*Beach* v. *Spokane R. & W. Co.*, 379.

Water Rights—Complaint—Demurrer.

15. A complaint in an action to restrain defendant from diverting waters to the use of which plaintiffs were entitled alleged the dates and amounts of the appropriations made by the predecessors in interest of the plaintiffs, the actual and continuous use of the waters, and the usual matters in complaints of like character. *Held* not demurrable for failing to deraign plaintiff's respective titles.—*Beach* v. *Spokane R. & W. Co.*, 379.

Injury Committed by an Insane Person—Complaint.

16. Under Code of Civil Procedure, Sec. 745, providing that, in pleading a judgment of a court, it may be stated to have been duly given or made, a complaint alleging that an insane person was "so declared by a court of competent jurisdiction," and "was duly committed to the insane asylum," does not show the duty of the keeper of the asylum to receive and keep such person, under Political Code, Sec. 2308, providing that the insane person, together with the order of the judge and certificate of the physicians, must be delivered to the keeper of the asylum, since the allegation does not show the name of the court or that any order was made or delivered to the keeper.—*Walter* v. *Mitchell*, 385.

Unlawful Detainer—Complaint.

17. A complaint to recover land alleged that defendant unlawfully withheld the same, and that the relation of landlord and tenant existed between the parties, which defendant denied, and alleged that plaintiff's grantor held the property as trustee to secure certain indebtedness due him from defendant, and not as owner, of which fact plaintiff had knowledge, and defendant demanded to be decreed the owner of the premises. On plaintiff's motion the equitable defense was tried first, resulting in a finding that

plaintiff had no knowledge of the equities existing between defendant and plaintiff's grantor, and that the relation between the latter parties was that of trustee and *cestui que* trust, as alleged by defendant. *Held*, that it was error to refuse to dismiss plaintiff's complaint, since the relation of landlord and tenant, as alleged by the plaintiff, was inconsistent with the facts already found. The action cannot be maintained as a suit to quiet title, since the necessary averment of ownership on the part of plaintiff does not appear, and the case was not tried on that theory.—*Boucher* v. *Barsalou*, 439.

PRESUMPTIONS.

As to settled and certified bill of exceptions, see BILL OF EXCEPTIONS, 3.
As to jurisdiction, see JUDGMENTS, 4, 5.
As to service of statement on motion for a new trial, see APPEALS, 38.
As to district courts generally, see JURISDICTION.
As to action of court in refusing an injunction, see APPEAL, 50.
As to findings of the court, see FINDINGS, 4.
As to presumption on appeal from a judgment, see APPEAL, 53.

PROBATE PROCEEDINGS.

Jurisdiction of District Court.

1. The district court's power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute.—*State ex rel. Kelly* v. *District Court*, 33.

Contest of Will—Time.

2. Grounds for contesting a will, which were filed before the date to which the hearing of the petition for probate had been postponed, were in time, though the time originally fixed by the court within which objections might be filed had expired.—*State ex rel. Donovan* v. *District Court*, 355.

Contest of Will—Intervention.

3. Code of Civil Procedure, Sec. 589, providing that any person, before trial, may intervene in an action by filing, by leave of court, the grounds of the intervention, does not apply to the filing of grounds for contesting a will.—*State ex rel. Donovan* v. *District Court*, 355.

Escheat—Right of State—Time.

4. Under the Codes of 1895, a proceeding by the attorney general to reduce property to his possession, or a proceeding by him in the nature of an inquest of office to determine whether the state has title to lands, may not, in any event, be commenced within five years after the death of the decedent.—*State ex rel. Donovan* v. *District Court*, 355.

Contest of Will—Contingent Interest.

5. To entitle a person to oppose a testamentary paper under Section 2329 of the Civil Code, it is sufficient if he disclose the existence of a contingent interest.—*State ex rel. Donovan* v. *District Court*, 355.

Contest of Will—Escheat—Right of State.

6. Civil Code, Sec. 1852, Subd. 8, provides that if an intestate leaves no heirs, his estate escheats to the state; and Section 2329 authorizes any person interested to contest a will. *Held*, that, where a testator died without heirs, the state was entitled to contest a proposed will, since it was an interested party, within the meaning of the Code.—*State ex rel. Donovan* v. *District Court*, 355.

Contest of Will—Escheat—Right of State.

7. Civil Code, Sec. 1867, provides that no resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession; and Section 1868 declares that, when succession is not claimed as provided in the preceding section, the district court must direct the attorney general to reduce the property to the possession of the state, and that the proceeds thereof must be deposited in the state treasury, to be paid to a nonresident alien whenever, within five years after such deposit, he shall prove that he is entitled thereto. Code of Civil Procedure, Part III, Title VIII, authorizes the attorney general to file an information on behalf of the state requiring all persons interested in an estate to appear and show cause why the same should not vest in the state. *Held* that, where a testator had no resident heirs, the state was entitled to file objections to the probate of the will before the expiration of five years from testator's death; otherwise the right to contest would be barred by Code of Civil Procedure, Sec. 2366, making the probate of a will conclusive if not contested within one year.—*State ex rel. Donovan* v. *District Court,* 355.

PUBLIC PRINTING.

Road Tax Receipts.

1. Under Political Code, Sec. 4233, fixing the maximum rates for public printing, and providing a certain rate for printing blanks, and an increased rate for county warrants, with stubs, printed on bond paper, and providing an additional compensation for numbering and perforating road tax receipts, special poor tax, or other blanks requiring such additional work, the price to be paid for printing, perforating and numbering road tax receipts is the price for ordinary blanks, with additional compensation for perforating and numbering, and not the special rate for county warrants.—*Stevens* v. *Ravalli County,* 306.

Special-Sized Blanks.

2. Under Political Code, Sec. 4233, fixing the maximum rate for public printing, and providing a reduction of a certain percentage for all blanks of a certain kind in excess of 1,000, and providing an additional compensation for perforating and numbering blanks, the charge for perforating and numbering is not reduced because the number exceeds 1,000.—*Stevens* v. *Ravalli County,* 306.

Special-Sized Blanks.

3. Where a printer contracts to furnish blanks to a county for a certain percentage of the maximum rate established by Political Code, Sec. 4233, which provides that the standard of size used shall be flat-cap sheets, 14 by 17 inches, the printer is not entitled to a special price for blanks not capable of being cut from flat-cap paper, since the extra expense of odd-sized blanks should have been considered by the printer in making the contract.—*Stevens* v. *Ravalli County,* 306.

Newspaper Notices.

4. Under Political Code, Sec. 4233, providing that newspaper notices printed for the public shall be paid for by the folio, which shall be measured by taking the space occupied by 100 words of solid nonpareil type, a newspaper publishing such notices in larger type is only entitled to compensation for the number of folios which such notices would have required if printed in nonpareil.—*Stevens* v. *Ravalli County,* 306.

QUIETING TITLE.

See PLEADING (civil) 17.

RECEIVERS.

Rights of Co-Tenants—Partition.

1. In a suit for partition between tenants in common a court of equity has power to appoint a receiver; but this power should be exercised with great caution lest injury be done to the rights of a co-tenant, hence in any such case where an appointment is sought there must be shown a legal or equitable right, reasonably clear and free from doubt, attended with danger of loss, and that no injury will result from the party whose rights are thus invaded.—*Heinze* v. *Kleinschmidt,* 89.

Rights of Co-Tenants—Partition.

2. Mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a co-tenant who has brought a suit for partition, and the mere fact that the care of the property involves considerable expense, will not authorize the appointment of a receiver pending the final hearing of the suit.—*Heinze* v. *Kleinschmidt,* 89.

Rights of Co-Tenants—Partition.

3. Where a co-tenant has gone into possession of mining property by consent of his co-tenant, with the understanding that he was at liberty to engage in mining, nothing short of a clear ouster and refusal to account, coupled with insolvency, would justify a court in taking the property from him through the agency of a receiver.—*Heinze* v. *Kleinschmidt,* 89.

Rights of Co-Tenants—Partition.

4. Under Section 592 of the Code of Civil Procedure, each tenant in common has the right to have mining property stand as it is until it is finally partitioned, and to justify a court in invading this right and mining the property through a receiver there must be a very clear showing.—*Heinze* v. *Kleinschmidt,* 89.

Injunction—Lessee's Right.

5. Certain parties claiming title to a mine sued for an injunction restraining certain others and their lessee from working the mine. The lessee's estate would terminate before a final adjudication of the matter could be had, and the restraining order sought would do him great damage. *Held,* that a receiver could not be appointed on the ground that the bond which would be required on granting the restraining order, suit on which would be the lessee's only remedy, would not afford such lessee adequate protection, since it would be presumed that the bond required would be sufficient to protect the lessee from any loss occasioned by such order.—*Hickey* v. *Parrot Silver & Copper Co.,* 164.

Lessee's Right.

6. The court would not appoint a receiver because the damages the lessee would suffer by reason of such restraining order would be difficult of ascertainment and proof.—*Hickey* v. *Parrot Silver & Copper Co.,* 164.

Lessee's Right.

7. Under Code of Civil Procedure, Sec. 950, Subd. 6, authorizing courts to appoint receivers in all cases "where receivers have heretofore been appointed by the usages of courts of equity," the lessee in possession of a certain mine, the operation of which was enjoined pending the settlement of a dispute as to title between the lessor and others, was not entitled to the appointment of a receiver, with power to remove ore, on the ground

that his lease would expire before final adjudication, and hence be rendered valueless by the injunction, since the receivership was not necessary to the preservation of the rights of the parties.—*Hickey* v. *Parrot Silver & Copper Co.*, 164.

Injunction—Extraction of Ore from Property.

8. Under Code of Civil Procedure, Sec. 950, Subd. 6, a receiver will not be appointed in an action for an injunction against trespasses with power to take away the substance of the estate, on the ground that the defendant will enjoin or has enjoined the plaintiff in possession from extracting ore from the property.—*Hickey* v. *Parrot Silver & Copper Co.*, 164.

Petition by Party in Possession.

9. A party in possession of, and asserting title to, mining property may not of his own volition over the objection of the party likewise asserting title thereto surrender the possession to the court for operation by it—through a receiver—of the property.—*Hickey* v. *Parrot Silver & Copper Co.*, 164.

Appointment.

10. The power to appoint a receiver is to be exercised with conservatism and caution; a strong showing should be made that the appointment is necessary to the preservation of the thing or right in controversy,—especially is this true when the court is invited by one of the parties to embark property seized by it through its receiver in industrial enterprises, and expose it to the hazard incident to the conduct of such a business.—*Hickey* v. *Parrot Silver & Copper Co.*, 164.

Lessee's Right.

11. A lessee is no more entitled to have a receiver appointed than is his landlord.—*Hickey* v. *Parrot Silver & Copper Co.*, 164.

City Streets—Excavation—Liability.

12. A receiver of a water company, appointed after the excavation has been filled, but before the occurrence of an accident resulting from its negligence in making the fill, is liable for such injuries, though he has no notice of the defect, since the appointment cast on him the duty of repairing the street, and he is presumed to have knowledge of the defect.—*Robinson* v. *Mills*, 391.

Permission to Sue Receiver—Necessity.

13. Under 25 U. S. Stat. 435, Sec. 3, authorizing suits against federal receivers without the consent of the appointing court in respect to any act of the receiver in carrying on the business, an action may be brought without consent against the receiver of a water company, who continues its business, for his failure to put a street in a safe condition, though it was excavated and defectively filled by the company before his appointment.—*Robinson* v. *Mills*, 391.

Receiver's Liability—Instructions.

14. Where a receiver is appointed for a water company which has negligently failed to properly fill an excavation made in the street, and suit is brought against the receiver for an injury resulting therefrom, after his appointment, error in contradictory instructions, some of which state his liability as dependent on notice and others as being absolute, does not authorize the reversal of a judgment for plaintiff, since the liability is not dependent on notice, and it is immaterial whether the question of notice was considered by the jury.—*Robinson* v. *Mills*, 391.

Notice to Receiver.

15. Where a receiver of a water company continues employees of the company who have formerly made and negligently filled an excavation in the street, and who attempt to remedy the defect after his appointment, their knowledge of the defect or of facts sufficient to impart notice thereof, constitute notice to the receiver.—*Robinson* v. *Mills,* 391.

Building and Loan Associations.

16. Under Civil Code, Sec. 561, constituting the directors of a corporation dissolved for any reason trustees to wind up its affairs, when the directors of a building and loan association, whose charter has expired, are acting as such trustees, a receiver should not be appointed unless it appears that the party complaining has been, or is about to be, injured by unwarranted procedure on the part of such trustees.—*Farrell* v. *Evans et al.,* 444.

REFEREES.

Trial—Restricting Cross-Examination.

1. Error of a referee in unduly restricting cross-examination of a witness was not prejudicial when the testimony sought to be elicited was covered substantially by subsequent testimony from the same witness on cross-examination.—*Ackley* v. *Phenix Ins. Co.,* 272.

Insurance Policy—Recovery—Amount.

2. A decision by a referee allowing a recovery on a fire policy, without any deduction on account of a prior loss for which proof had been made, was not erroneous, where there was no evidence of the amount of the prior loss or that it had been adjusted and paid.—*Ackley* v. *Phenix Ins. Co.,* 272.

RIGHT OF WAY.

See CONDEMNATION PROCEEDINGS.

RULES OF DISTRICT COURTS.

Motions—Affidavits in Support Thereof.

1. Under a rule of court requiring that affidavits and papers to be used in support of a motion shall be served on the attorneys of the parties at the time notice of motion is served, it was not error for the court to refuse to consider affidavits of the moving party served two days after the notice and three days before the hearing of a motion, such affidavits not referring to matters coming to the attention of the movants after notice was served.—*State ex rel. King* v. *District Court,* 202.

Force and Effect.

2. Reasonable rules of the district courts, when made and published, are part of the law of the land so far as procedure in such courts is concerned, and so far as the supreme court is concerned in passing upon the action of such courts in relation thereto.—*State ex rel. King* v. *District Court,* 202.

RULES OF SUPREME COURT.

Defective Brief.

1. Where appellant's brief,—filed while former rules were still in force,—contains assignments of error which fail to comply with the requirements of the former, as well as the present, rules, such assignments will not be considered.—*Murray* v. *Montana Lumber & Manufacturing Co.,* 14.

Defective Brief.

2. Where an assignment of error in appellant's brief, though fatally defective under the rules in force when the brief was filed, yet so far complies with the present rules as to enable the supreme court to examine the questions raised by it without additional labor, the court will waive such defect. —*Murray* v. *Montana Lumber & Manufacturing Co.*, 14.

Defective Brief.

3. Where assignments of error are not referred to in the argument in appellant's brief, the court will assume that counsel for appellant considered them without merit.—*Murray* v. *Montana Lumber & Manufacturing Co.*, 14.

Defective Brief.

4. An appeal will be dismissed where the statement of the case in appellant's brief fails to comply with the requirement of Subdivision "n" of Section 3 of Rule X of the Supreme Court.—*Conklin* v. *Cullen*, 30.

Defective Brief.

5. Under Supreme Court Rule 5, Subsection 3 (16 Montana 595), which was operative when appellants' brief was filed, an order appealed from will be affirmed when appellants' brief does not refer to any page number of the transcript, nor contain a specification of errors.—*Harrington* v. *Smith*, 111.

Defective Brief.

6. A specification of the error or errors relied upon is an indispensable prerequisite to the consideration of appealed causes on their merits.—*Harrington* v. *Smith*, 111.

Defective Brief.

7. When the appellant's brief is not in substantial conformity with the Rules of the Supreme Court, the appeal will be dismissed on motion of the respondent; in the absence of such motion the court will affirm the order or judgment appealed from.—*Patterson* v. *Pfouts*, 163.

Record on Appeal—Printed Matter.

8. Under Supreme Court Rule VIII, Sec. 1, providing that any printed matter introduced in evidence in the trial court may be made a part of the record on appeal by being authenticated by a certificate of the trial judge, printed matter so introduced in evidence will not be considered on appeal unless certified to by the trial court.—*Stevens* v. *Ravalli County*, 306.

SERVICE.

See SUMMONS.
SUPREME COURT, 8.

STARE DECISIS.

Rule in Matters of Practice.

In matters of practice the rule of *Stare decisis* does not control, as it is proper to establish a correct and legal practice, if error has been committed in a former opinion of the court, provided it is apparent that no substantial injury will be suffered by litigants by reason of reliance upon the precedent. —*Wetzstein* v. *Boston & Montana C. C. & S. Mining Co.*, 135.

STATUTE OF LIMITATIONS.

Action on an Account Not Founded on a Writing.

1. Laws of 1889. p. 172, provides that an action on an account, not founded on a written instrument signed by the party chargeable therewith,

shall be commenced within five years. Code of Civil Procedure, Sec. 514, Subd. 1, which took effect July 1, 1895, declares that actions of that nature shall be commenced within three years. Section 3456 provides that, when a limitation prescribed in any existing statute has begun to run before the Code takes effect, the time which has already run shall be deemed part of the time prescribed as such limitation by the Code. *Held*, that suit commenced December 29, 1897, on an open account not founded on a writing, due December 31, 1892, was barred by limitations, notwithstanding the period of six months after July, 1895, allowed by the Code within which to commence suit, was unreasonably short, since suit was not commenced within a reasonable time thereafter.—*Sherman* v. *Nason*, 283.

Highways—Prescription.

2. Plaintiff for several years had hauled the ore from its mine across defendant's land to a public highway. The public had traveled across the land where they chose since 1887, but the particular road since traveled by plaintiff was constructed by persons hauling its ores under contract in 1893. *Held*, that plaintiff had not acquired a prescriptive right to such road under Compiled Statutes of 1887, Div. 1, Sec. 29, fixing a limitation of five years for actions to recover real property, when the Code of Civil Procedure took effect, July 1, 1895, which, in Section 483, prescribes a limitation of ten years, since such right over uninclosed land cannot be acquired until the travel has been confined to a particular way for the length of time prescribed by such statutes.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consol. Mining Co.*, 427.

Public Highways—User.

3. Under Political Code, Sec. 2600, providing that roads laid out or erected by others than the public, dedicated or abandoned to the public, are public highways, such dedication or abandonment is not shown by mere user until the period of limitations of actions to recover real property has elapsed.—*Montana Ore Purchasing Co.* v. *Butte & Boston Consol. Mining Co.*, 427.

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STATUTORY CONSTRUCTION.

"May" Interpreted to Mean "Shall" or "Must."

1. In those cases where the public or persons possess the right to require that the power conferred in a statute by the word "may" be exercised, the word is imperative and mandatory, being the equivalent of "shall" or "must."—*Montana Ore Purchasing Co.* v. *Lindsay*, 24.

Adoption of Statute from Another State.

2. When one state adopts a statute from another state, after a judicial interpretation thereof by the courts of the parent state applicable to the conditions of the adopting state, the legislature will be presumed to have adopted the interpretation with the statute.—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 41.

Prerogative of the Courts.

3. The preventive force of an act of the legislature, as well as its positive effect, is to be determined by the judiciary; the law-making power cannot determine the past legal force and effect of any statute.—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 41.

SUMMONS.

Service—Affidavit.

1. An affidavit of service of summons made by a private person may upon direct attack, other than appeal, be falsified by evidence *aliunde* the record. —*Burke* v. *Inter-State S. & L. Association,* 315.

Service—Affidavit—Jurisdiction.

2. An affidavit of service of summons omitted the statement that the person serving the same was over 18 years of age, as required by Compiled Statutes 1887, Secs. 71, 78, 80, providing by whom and how the service shall be made, what proof thereof shall be sufficient, and that from the time of service of summons the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. *Held,* that a judgment rendered thereon was not void on its face, so as to be subject to collateral attack; the judgment roll showing no want of jurisdiction, but merely irregularity in obtaining it.—*Burke* v. *Inter-State S. & L. Association,* 315.

Service by One Under 18 Years of Age.

3. . Service of summons by one who was not of the age required by statute, though defective, would not make void or subject to collateral attack a judgment rendered by a court having jurisdiction of the subject-matter and parties, and keeping within the limits of its power.—*Burke* v. *Inter-State S. & L. Association,* 315.

Service on Sunday.

4. Service of summons on Sunday is not a nullity, but a mere irregularity, and a judgment based upon it is not void, but voidable (overruling *Hauswirth* v. *Sullivan,* 6 Mont. 203).—*Burke* v. *Inter-State S. & L. Association,* 315.

SUPREME COURT.

Supervisory Control.

1. The writ of mandate will not be made to serve the office of a supervisory control writ.—*Montana Ore Purchasing Co.* v. *Lindsay,* 24.

Supervisory Control.

2. Under Constitution, Art. VIII, Sec. 2, giving the supreme court a general supervisory control over all inferior courts, a writ of supervisory control will not be granted to command a district court to sustain a motion for judgment on the pleadings, since the party has a remedy if he should finally be defeated in the action.—*State ex rel. Moore* v. *District Court,* 31.

Original Jurisdiction—*Mandamus.*

3. Where the state treasurer refused to pay interest on certain warrants drawn on the school of mines building fund, directed by statute to be paid therefrom, the mere fact that it was a state officer refusing to perform a ministerial duty was not a sufficient reason for invoking the original jurisdication of the supreme court by an application for *mandamus.*—*State ex rel. State Savings Bank* v. *Barret,* 112.

Original Jurisdiction—*Mandamus.*

4. In the future, applications to the supreme court for writs of mandate must "set forth * * * the reasons which render it necessary that the writ should issue originally from this court" (Rule II, Subdivision 2).—*State ex rel. State Savings Bank* v. *Barret,* 112.

Supervisory Control.

5. Constitution, Art. VIII, Secs. 2, 3, give the supreme court general supervisory control over other courts, under such regulations as may be prescribed by law, and confers power to issue and hear writs of *mandamus*, etc., and such other original and remedial writs as may be necessary to the exercise of its appellate jurisdiction. Code of Civil Procedure, Sec. 205, declares that, when jurisdiction is conferred on a court, and the course of proceeding is not specifically pointed out, any suitable process conformable to the spirit of the Code may be adopted. *Held*, that the power of supervisory control was a distinct power, and might be exercised to control the discretion of an inferior court in making an order from which no appeal would lie, and for which the writs appertaining to the appellate jurisdiction furnished no remedy.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court*, 504.

Supervisory Control.

6. Where defendant sued relators, alleging that they were removing ore from certain premises the right to which was in defendant, but the evidence showed that the *prima facie* right was in relators, an order granting defendant and his employees right to enter and inspect all of relators' surrounding mines for the period of 40 days for the purpose of obtaining evidence, being an order not appealable nor subject to control by any of the specified writs within the jurisdiction of the court, it was a proper case for the court to exercise the power of "supervisory control" over the inferior court, conferred by Constitution, Art. VIII, Sec. 2.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court*, 504.

Supersedeas.

7. Where an application to the supreme court for a writ of *supersedeas* alleges grounds which should be addressed to the district court in the first instance, the application will be dismissed.—*Montana Ore Purchasing Co.* v. *Boston & Montana C. C. & S. Mining Co.*, 571.

Writ of Supervisory Control—Service.

8. The writ of supervisory control shall be served by the marshal of the supreme court, and in the same manner as a summons is served in civil cases.—*State ex rel. Anaconda Copper Mining Co.* v. *District Court*, 572.

Writ of Supervisory Control—Form.

For an approved form of the writ of supervisory control, see:—*State ex rel. Anaconda Copper Mining Co.* v. *District Court*, 572.

SURETIES.

Rendition of Judgments against.

1. Compiled Statutes, Fifth Division, Sec. 1293 (Code of Civil Procedure of 1895, Sec. 1001), refers to the rendition of judgments upon obligations the makers of which signed in fact as principal and surety, and not to judgments upon those in which the makers are all principals; it applies also to cases in which the parties whose rights are to be determined are before the court, and not to cases in which judgment is sought, at the option of the plaintiff, against one of the obligors.—*Brownlee* v. *Young*, 38.

Notes—Principals—Sureties.

2. *Obiter.*—Where two persons execute a note, and each of them receives one-half of the consideration, they are, as between themselves, principals for half the debt and sureties for each other to the extent of the other half,

and this principle holds true no matter what may be the number of the obligors.—*Brownlee* v. *Young,* 38.

Qualification—Rehearing.

3. Application for leave to file a petition for a rehearing on the question of the qualification of F. Augustus Heinze as surety on a bond. Application denied.—*Boston & Montana C. C. & S. Mining Co.* v. *Montana Ore Purchasing Co.,* 87.

TELEPHONES.

Lease—Right to Remove Telephone.

1. A telephone company leased a telephone to plaintiff under a contract requiring plaintiff to pay $16 per quarter in advance on demand, and authorized the company to terminate the contract and remove the telephone on default in payment by serving written notice on plaintiff, and providing that the contract could not be varied or waived except by a writing signed by the general manager of the company. Plaintiff did not pay an installment of rent on Saturday when it became due, on a demand by the collector of the company therefor, by reason of not having a check book, and the collector suggested that the payment be deferred till the succeeding Monday. On that day the plaintiff tendered the sum to the general manager, who informed him that notice of termination had been served at plaintiff's place of business, and the telephone removed. *Held,* in an action against the company therefor, that it was error to refuse to instruct that the failure to pay the collector on demand authorized the company to forfeit the contract, unless the extension of time, if any, by the collector, was in writing, and signed by the general manager.—*Ashley* v. *Rocky Mt. Bell Tel. Co.,* 286.

Termination of Contract by Service of Notice.

2. Where the defendant telephone company, in an action for removing a telephone from a customer for a default in the payment of rent, contends that it had terminated the contract by service of notice before the plaintiff tendered the rent due, it is not error to submit the question whether the contract was terminated by notice, as authorized by contract, before the amount due was rendered, though the evidence is uncontradicted that it was so terminated, since the jury is the sole judge of the credibility of the witnesses testifying to the service of the notice.—*Ashley* v. *Rocky Mt. Bell Tel. Co.,* 286.

Lease—Default in Payment of Rent—Tender.

3. Where a telephone company terminates a lease of an instrument on the alleged ground of a default in the payment of rent, and afterwards refuses a payment thereof on the ground of such termination, it is not necessary that such tender should be kept good by a deposit in court to authorize the lessee to recover for wrongful removal of the instrument.—*Ashley* v. *Rocky Mt. Bell Tel. Co.,* 286.

Wrongful Removal—Mitigation of Damages.

4. Where an action is brought against a telephone company for continuing damages caused by an alleged wrongful removal of a telephone from a customer, the company may plead in mitigation of damages that it afterwards offered to replace the telephone on the payment of certain expenses by the customer, since the customer is required to do every act in his power to decrease the damages resulting from the wrongful act, and the acceptance of the telephone on such condition will not prevent an action for the accrued damages.—*Ashley* v. *Rocky Mt. Bell Tel. Co.,* 286.

TENANCY IN COMMON.

See INJUNCTION.

Effect of Act of February 8, 1865.

1. The Act of February 8, 1865, Section 1 (Bannock Statutes, p. 454), destroyed the right of survivorship in joint tenancies; it, however, was not retrospective in its operation, but affected subsequently accruing rights only, since the legislature had no power to interfere with existing rights by converting joint tenancies into tenancies in common. The Act of February 8, 1865, Section 2 (Bannock Statutes, p. 454), destroyed those characteristics of tenancies in common wherein they mainly differ from holdings in severalty, leaving the necessity for voluntary or judicial partition as the chief remnant of the distinguishing feature of this species of ownership; but it was not retrospective in its operation.—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 41.

Mining and Removal of Ore from Common Property.

2. For one co-tenant, without the consent of the other, to mine and remove ore from the common property, is an unauthorized taking away and lessening in value of the property within the meaning of the Act of 1865 (Bannock Statutes, p. 454).—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 41.

Effect of "House Bill No. 1" of the Laws of 1899.

3. The provisos of "House Bill No. 1" of the Laws of 1899 (p. 134) apply to co-tenants whose estates were in existence when the law was passed, and as to such estates, it is an attempt to disturb or destroy vested rights and, therefore, is inoperative and void as to them, being repugnant to Sections 3 and 27 of Article III of the Constitution of Montana, and also Amendment XIV of the Federal Constitution.—*Butte & Boston Consol. Mining Co.* v. *Montana Ore Purchasing Co.*, 41.

Partition—Receiver.

4. In a suit for partition between tenants in common a court of equity has power to appoint a receiver; but this power should be exercised with great caution lest injury be done to the rights of a co-tenant, hence in any such case where an appointment is sought there must be shown a legal or equitable right, reasonably clear and free from doubt, attended with danger of loss, and that no injury will result to the party whose rights are thus invaded.—*Heinze* v. *Kleinschmidt*, 89.

Mining Common Property Through a Receiver.

5. Under Section 592 of the Code of Civil Procedure, each tenant in common has the right to have mining property stand as it is until it is finally partitioned, and to justify a court in invading this right and mining the property through a receiver there must be a very clear showing.—*Heinze* v. *Kleinschmidt*, 89.

Mining Claim—Oral Partition.

6. Where, prior to the location of a quartz mining claim, the surface was occupied by different persons, who agreed that one should locate for all, and that, after patent issued, conveyances should be made, vesting in each full title to the surface occupied by him, but the conveyances were in fact never made, the agreement and continued occupation after the patent issued did not constitute an oral partition, as the location of such claim confers on the locator the right to the exclusive enjoyment of all the surface ground. —*Mullins* v. *Butte Hardware Co.*, 525.

Mining Claim—Oral Partition.

7. Prior to the location of a quartz mining claim the occupants of the surface had but a naked possessory right, and after the location by one of them for all, under an agreement to convey to each the surface occupied, the right was but an equity to hold such person as trustee, and the agreement and continued occupation could not amount to an oral partition.—*Mullins* v. *Butte Hardware Co.*, 525.

Possession—Occupancy—Use.

8. Tenants in common hold their lands by unity of possession, and each has the right to enter upon, occupy and use the whole or any part of the common property.—*Mullins* v. *Butte Hardware Co.*, 525.

Possession—Recorded Title—Notice.

9. In so far as persons other than the tenants themselves are concerned, the actual occupancy of one tenant in common is the rightful possession of all the owners, and if a title under which they might hold is of record and is consistent with the occupancy, the possession must be referred to the record and will not be constructive notice of any other title.—*Mullins* v. *Butte Hardware Co.*, 525.

Oral Partition—Notice.

10. The person securing the patent having executed deeds to each of the occupants for an undivided interest in the mine, but not referring to any surface interest as distinguished from the interest in the whole claim, the continued occupation of the separate portions of the surface, with payment of taxes, and the making of improvements thereon, was not inconsistent with the record title, and gave no notice to subsequent purchasers or incumbrancers that the occupant claimed any certain divided interest; and Civil Code, Sec. 502, relating to notice, had no application.—*Mullins* v. *Butte Hardware Co.*, 525.

Oral Partition—Notice—Burden of Proof.

11. If the burden was on subsequent purchasers to show that they purchased interests in a mining claim for a valuable consideration, and without notice of the occupant's equitable unrecorded title to certain surface rights, such burden was discharged by the introduction of the deeds under which the purchasers held, setting forth a valuable consideration.—*Mullins* v. *Butte Hardware Co.*, 525.

Oral Partition—Notice—*Bona Fide* Purchaser.

12. The record title to a mine held by the occupants of the surface was of undivided interests, without reference to any claim for separate and distinct surface right, and C. one of such owners conveyed an undivided interest to M. by deed recorded in 1880. M. conveyed to H. by deed recorded in 1882. H. conveyed to D. by deed recorded in 1889. In 1885 the same owner C. conveyed another undivided interest to N. by a deed purporting also to convey a distinct surface right thereon. *Held*, that the recorded deeds to M. and H. were sufficient to protect D. and his grantees from a claim that they had notice of the claim to a distinct portion of the surface. The occupancy of the lot by N., as his grantor's lessee, for a year and a half before his purchase, and his continued occupancy, was not notice of the separate claim to surface rights. Even if M. and H. were chargeable with notice of N's claim, the title of D. and his grantees was superior.—*Mullins* v. *Butte Hardware Co.*, 525.

TENDER.

Necessity to Keep Tender Good—Waiver.

1. Where a telephone company terminates a lease of an instrument on the alleged ground of a default in the payment of rent, and afterwards refuses a payment thereof on the ground of such termination, it is not necessary that such tender should be kept good by a deposit in court to authorize the lessee to recover for wrongful removal of the instrument.—*Ashley* v. *Rocky Mt. Bell. Tel. Co.*, 286.

Necessity to Make Tender—Waiver.

2. "It is a general rule that, when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused,—that payment or performance will not be accepted." (*Hills* v. *Bank*, 105 U. S. 319.)—*Ashley* v. *Rocky Mt. Bell Tel. Co.*, 286.

Costs—Tender of Sum Due After Suit Brought.

3. Tender or payment after suit brought, to be effectual to prevent further costs, must be of the sum due, with cost accrued up to that time, and interest, if interest be due.—*Pape et al.* v. *Chauvin-Fant Furniture Co.*, 417.

TRESPASS.

Diverting Water Course—Damages.

1. Defendant railway company entered on plaintiff's mining claim, and diverted the waters of a creek which crossed the claim. Afterwards plaintiff conveyed to defendant a 40-foot strip across his claim, and across the old bed of the creek, and released "all claim for any damages that may arise or be caused to the land adjoining such railroad, on either side thereof, in consequence of the use of said premises for its said road." *Held*, that such conveyance did not release plaintiff's claim for damages for the trespass previously committed in diverting the creek.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

Diverting Water Course—Measure of Damages.

2. In an action for trespass and diverting a stream crossing plaintiff's land defendant should be permitted to show what it would cost to restore the stream to its former channel, as the measure of damages would be the expense of such restoration and such other damages as could not be avoided. —*Sweeney* v. *Montana Central Ry. Co.*, 543.

Diverting Water Course—Diminishing Damages.

3. In an action for injuries caused by diversion of a stream, evidence that plaintiff, by a small expense in riprapping the bank of the new channel, could have avoided or diminished the damages to his property, was admissible, it being his duty to use reasonable care to save it from injury.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

Diverting Water Course—Diminishing Damages.

4. One is not, as a rule, expected to enter upon a third party's premises to save his own property from increased injury resulting from the wrong act of another; but it not unreasonable to expect an injured party to go upon a vacant, uninclosed and unoccupied mining claim to prevent serious damage, in a great emergency.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

Condemnation Proceedings—*Ex Parte* Order.

5. Where a railroad company commenced condemnation proceedings to acquire a right of way across plaintiff's land, and procured an *ex parte* order permitting it to take possession of the land without payment, and staying all actions and proceedings against it, such order was void, and any entry on plaintiff's land thereunder was a trespass.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

Damages—Evidence.

6. Where, in an action to recover for permanent injury to land occasioned by a trespass, a witness is questioned as to the value of adjoining land, and a map is used, and land inquired about is pointed out to the jury by counsel, the receipt of such testimony is not error, since it cannot be said that the jury did not understand the situation.—*Sweeney v. Montana Central Ry. Co.*, 543.

Damages—Evidence.

7. In an action for trespass and permanent injury to land, it was error to receive testimony of plaintiff and another as to what was offered for a strip across the land for a railroad, where there was no evidence that the one making the offer was agent of the railroad company, or had any authority to make the offer.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

Damages—Evidence.

8. Where land has been permanently injured by a trespass, witnesses familiar with it, and with the uses to which it could be put, may give their opinion of its market value, in view of such uses, though it may not have been previously used for such purposes.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

Damages.

9. In an action for trespass and permanent injury to land, the owner has a right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it could be used, whether or not he so used it.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

TRIAL.

Allegations—Proof.

1. Allegations and proof must correspond.—*Talbott* v. *Heinze*, 4.

Ejectment—Directing Verdict.

2. Where plaintiff brings ejectment to recover a mining claim, and the defendant offers evidence of a superior claim, and that plaintiff wrongfully obtained the patent thereto, and holds the property in trust for defendant, it is not error to refuse to strike out such evidence for insufficiency, but the proper method is to move to direct a verdict.—*Murray* v. *Montana L. & M. Co.*, 14.

Evidence—Refusal to Strike Out.

3. Where evidence offered by defendant is admissible against one plaintiff, but not against another, the latter cannot complain of the refusal of the court to strike out such evidence.—*Murray* v. *Montana L. & M. Co.*, 14.

Trial by Referee—Restricting Cross-Examination.

4. Error of a referee in unduly restricting cross-examination of a witness was not prejudicial when the testimony sought to be elicited was covered substantially by subsequent testimony from the same witness on cross-examination.—*Ackley* v. *Phenix Ins. Co.*, 272.

Motion to Strike—Notice.

5. Notice of a motion to strike out part of an answer, set for hearing August 2d, but not called till the day of trial, in October of the same year, when both parties were present, was sufficient.—*Kipp* v. *Silverman,* 296.

Restricting Cross-Examination.

6. Under Code of Civil Procedure, Sec. 3376, courts should incline to extend, rather than restrict, the right of cross-examination.—*Kipp* v. *Silverman,* 296.

Right of Cross-Examination.

7. The right of cross-examination extends, not only to all facts stated by the witness in his original examination, but to all other facts connected with them—whether directly or indirectly—which tend to enlighten the jury upon the question in controversy.—*Kipp* v. *Silverman,* 296.

Foreclosure—Evidence—Motion to Strike Out.

8. In a suit to foreclose a mortgage, it was proper to refuse to strike out the testimony of the plaintiff at the close thereof on the ground that her testimony was incompetent, immaterial and irrelevant, in that she had failed to produce, or account for the nonproduction of, the note on which the action was based; plaintiff's testimony being not only as to a search for the note, but as to circumstances tending to support her allegation that the note had not been paid; and, as the testimony for plaintiff was not all in, the court had no knowledge but that further evidence might be introduced showing a search.—*Withers* v. *Kemper et al.,* 432.

Instructions—Appeal—Review.

9. Under Code of Civil Procedure, Sec. 1080, Subd. 7, requiring a party desiring special instructions to reduce them to writing, and to request the court to so instruct, alleged errors in omitting to charge on certain points will not be considered in the absence of such a request.—*Helena & Livingston S. & R. Co.* v. *Lynch,* 497.

Refusal of Requested Instructions.

10. It is not error for the court to refuse to give a requested instruction which contains a statement of an alleged fact which it is within the province of the jury to find or not, according as they may or may not believe the witnesses upon the point.—*Sweeney* v. *Montana Central Ry. Co.,* 543.

TRUSTEES.

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UNLAWFUL DETAINER.

See PLEADING (Civil) 17.

VERDICT.

Refusal to Direct Verdict—Review.

1. Evidence reviewed and *held,* that the trial court erred in denying defendants' motion to instruct the jury to return a verdict for the defendant.—*Nolan* v. *Montana Central Ry. Co.,* 107.

Directed Verdict—Evidence—Review.

2. The truth of plaintiff's evidence is to be assumed, and it is to be regarded in the most favorable light on a motion to direct a verdict for defendant—*Freeman* v. *Sand Coulee Coal Co.,* 194.

Condemnation Proceedings—*Ex Parte* Order.

5. Where a railroad company commenced condemnation proceedings to acquire a right of way across plaintiff's land, and procured an *ex parte* order permitting it to take possession of the land without payment, and staying all actions and proceedings against it, such order was void, and any entry on plaintiff's land thereunder was a trespass.—*Sweeney* v. *Montana Central Ry. Co.*, 543.

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2. The truth of plaintiff's evidence is to be assumed, and it is to be regarded in the most favorable light on a motion to direct a verdict for defendant—*Freeman* v. *Sand Coulee Coal Co.,* 194.

Excessive Verdict—Remitting the Excess.

3. Where, in an action for conversion, the trial court regards the verdict as in excess of the value of the property, it is not error to give the plaintiff the option of remitting the excess, and, if he does so, to order the verdict to stand for the residue, instead of granting a new trial absolutely, under Code of Civil Procedure, Sec. 1771, Subd. 6, authorizing the granting of a new trial for insufficiency of the evidence to justify the verdict.—*Chicago Title & Trust Co.* v. *O'Marr,* 242.

Damages—Verdict—Review.

4. A verdict assessing damages will not be set aside, the evidence being conflicting, and there being sufficient to support the verdict.—*Helena & Livingston S. & R. Co.* v. *Lynch,* 497.

WAIVER.

As to errors on appeal, see APPEAL, 11.
As to tender, see TENDER.
As to defect in pleading, see APPEAL, 30.
As to assignments of error, see BRIEFS, 1.

WARRANTS.

State Warrants—Assignment—Interest.

1. Where contractors were paid for state work by warrants drawn on a certain fund in the state treasury, and were entitled to interest thereon after presentation, the assignees of such contractors succeeded to all their rights, notwithstanding the warrants were non-negotiable, and were entitled to interest on the warrants.—*State ex rel. State Savings Bank* v. *Barret,* 112.

State Warrants—Acceptance at Par—Interest.

2. Where contractors working for the state agreed to accept warrants on a certain fund at par, and in full payment for the work, such acceptance did not preclude their statutory right to interest on the warrants, but merely bound them to accept such warrants at their face value.—*State ex. rel. State Savings Bank* v. *Barret,* 112.

WATER RIGHTS.

Appeal—Evidence—Review.

1. The defendant in an action for diverting water contended that the reason that the water did not flow in plaintiff's ditch was due to the improper construction. Findings were made that plaintiff and defendant had agreed to construct their ditches on a 12-inch grade, and that plaintiff's ditch was not on a 12-inch grade, and that one point in plaintiff's ditch was as high as the bottom of the main ditch where plaintiff's ditch connected therewith, but that plaintiff's ditch was sufficient to irrigate his land. The findings did not show the grade of plaintiff's ditch, or that the bottom of the main ditch was not below the agreed grade. The court found that the allegation of the complaint was sustained. *Held,* that the findings were sufficient to support a judgment for plaintiff.—*Anderson* v. *Cook,* 330.

Owners in Common—Diversion of Water.

2. An owner in common of a water right, who takes water at a main ditch at a point above where the other owner takes water therefrom, is not entitled to withdraw an amount of water in proportion to his ownership of the water right, provided he leaves the proportionate share of the other

owner in the main ditch, without regard to the seepage and evaporation of the remainder before it reaches the other owner, a mile distant.—*Anderson* v. *Cook*, 330.

Action to Restrain Diversion—Parties.

3. Property owners having the right to divert the waters of a creek for irrigation purposes may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled.—*Beach* v. *Spokane R. & W. Co.*, 379.

Action to Restrain Diversion—Parties—Demurrer.

4. Where the complaint in a suit to restrain defendant from diverting the waters of a creek does not show that plaintiffs had not brought in all the claimants of such waters, the objection that there was a defect of parties cannot be taken by demurrer.—*Beach* v. *Spokane R. & W. Co.*, 379.

Action to Restrain Diversion— Parties—Answer.

5. Where property owners having the right to divert waters from a creek seek to restrain a diversion therefrom by a third person, all the property owners using such waters are not necessary parties, and hence allegations to that effect in defendant's answer were properly stricken out.—*Beach* v. *Spokane R. & W. Co.*, 379.

Action to Restrain Diversion—Complaint—Demurrer.

6. A complaint in an action to restrain defendant from diverting waters to the use of which plaintiffs were entitled alleged the dates and amounts of the appropriations made by the predecessors in interest of the plaintiffs, the actual and continuous use of the waters, and the usual matters in complaints of like character. *Held* not demurrable for failing to deraign plaintiff's respective titles.—*Beach* v. *Spokane R. & W. Co.*, 379.

WILLS.

See PROBATE PROCEEDINGS.

WITNESSES.

Credibility—Instruction.

1. Code of Civil Procedure, Sec. 3390, Subd. 3, requiring the jury to be instructed on all proper occasions that a witness false in one part of his testimony is to be disregarded in others, does not authorize such an instruction without limiting it to wilfully false statements as to material matters.—*Ashley* v. *Rocky Mt. Bell Tel. Co.*, 286.

Plaintiff as Witness—Instruction.

2. Error, in giving such an instruction, in designating the plaintiff by name, and authorizing his testimony to be disregarded if he has testified falsely in any part of his evidence, is harmless error when a verdict is returned in his favor.—*Ashley* v. *Rocky Mt. Bell Tel. Co.*, 286.

Refreshing Memory—Memoranda.

3. Code of Civil Procedure, Sec. 3375, provides that a witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred, or when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. *Held*, that a witness was properly allowed to refer to a memorandum of articles as shown in evidence by the sheriff's return, on which the witness, before the trial, had extended the unit and gross cost price obtained by taking the prices from his cost book and price lists kept

by himself, and adding the freight and insurance apportioned by percentage. —*Kipp* v. *Silverman*, 296.

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